Supreme Court, U. S.
FILED
JAN 14 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-145

THE NORTHERN CHEYENNE TRIBE,

Petitioner,

v.

WILLIAM HOLLOWBREAST, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS ELVA L. LITTLECHIEF WILLIAMSON AND JAMES BOWEN

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ON WRIT OF CERTIORARI TO THE UNITED STATES
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BRIEF FOR RESPONDENTS ELVA L. LITTLECHIEF WILLIAMSON AND JAMES BOWEN

ISSUES PRESENTED

1. Did the Northern Cheyenne Indian allottees receive a vested, or constitutionally protected interest in the minerals underlying their allotment lands from the following language of the Northern Cheyenne Allotment Act: "That at the expiration of fifty years . . . minerals . . . and other natural deposits of said allotment

shall become the property of the respective allottees or their heirs."?[1]

2. May Congress divest such individual interest in allotment land under its "plenary" power over Indian tribes?

STATEMENT OF THE CASE

While the Northern Cheyenne Indian Reservation was created by Executive Order in 1884,[2] this reservation was not the object of any substantive legislation until 1926. On June 3, 1926 Congress passed an allotment act,[3] subdividing the communally held tribal property into parcels for individual Indian ownership. This act disposed of the minerals as follows:

> "Sec. 3. That the timber, coal or other minerals including oil, gas, and other natural deposits, on said reservation are hereby reserved for the benefit of the tribe and may be leased with the consent of the Indian Council under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That *at the expiration of fifty years* from the date of the approval of this Act the coal and other minerals, including oil, gas, and other natural deposits, of said allotment *shall become the property of the respective allottees or their heirs: Provided further,* That the unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians. Act of June 3, 1926, 44 Stat. 690. (Emphasis added)

[1]Act of June 3, 1926, 44 Stat. 690.

[2]The Northern Cheyenne Indian Reservation was set apart by two executive orders. The first was by President Chester A. Arthur on November 26, 1884, C. Kapplar *Indian Affairs: Laws and Treaties,* Vol. I at 860, and later by President William McKinley on March 19, 1900, C. Kapplar *Indian Affairs: Laws and Treaties,* Vol. I at 860-61.

[3]Act of June 3, 1926, 44 Stat. 690.

Thus, the minerals were under tribal control for a term of fifty years, such possessory control then passing to the allottees. This section gave the Indian allottees a vested remainder type interest in the minerals underlying their individual allotments.

However, in 1968, just eight years before this mineral interest would become possessory, Congress attempted to divest the allottees' interest in the minerals by providing:

> "Sec. 3.(a) The coal or other minerals, including oil, gas, and other natural deposits, on said reservation are *hereby reserved in perpetuity for the benefit of the tribe* and may be leased with the consent of the Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a-f), under such rules, regulations, and conditions, as the Secretary of the Interior may prescribe." Act of July 24, 1968, 82 Stat. 424. (Emphasis added)

Due to Congressional doubt concerning the constitutionality of such a taking[4] the 1968 amendment specifically required the tribal council to bring this suit

[4]Congress was evidently concerned about the possibility of an Indian Claims Commission judgment for the value of the minerals divested. H.R.Rep. No. 1292 90th Cong. 2nd Sess. 4 (1968).

to quiet title in the mineral rights affected.[5] If the tribal council wins, the 1968 amendment remains operative. However, if the allottees prevail, the 1968 amendment automatically becomes inoperative.[6] Hence, whether the 1968 amendment shall divest the allottees in favor of this tribal council and the State of Montana[7] was left up to the Courts.

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[5]"Sec. 2. The Northern Cheyenne Tribe is authorized to commence in the United States District Court for the District of Montana an action against the allottees who received allotments pursuant to the Act of June 3, 1926, as amended, their heirs or devisees, either individually or as a class, *to determine whether* under the provisions of the Act of June 3, 1926, as amended, the allottees, their heirs or devisees, have *received a vested property right in the minerals which is protected by the fifth amendment.* The United States District Court for the District of Montana shall have jurisdiction to hear and determine the action and an appeal from its judgment may be taken as provided by law. *If the court determines that the allottees, their heirs or devisees, have a vested interest in the minerals which is protected by the fifth amendment, or if the tribe does not commence an action as here authorized within two years from the date of this Act, the first section of this Act shall cease to have any force or effect,* and the provisions of section 3 of the Act of June 3, 1926, as amended by the Acts of July 24, 1947, and September 21, 1961, shall thereupon be carried out as fully as if section 3 had not been amended by this Act." Act of July 24, 1968, 82 Stat. 424. (Emphasis added).

[6]Sec. 2 of the 1968 amendment specifically conditions transfer of the remainder interest in the minerals upon the tribal council's *successful* prosecution of this suit. See n.5.

[7]See Sec. III infra, which explains how the 1968 amendment accomplishes a substantial taking for non-Indian purposes in favor of the State of Montana.

As required by the 1968 amendment, the tribal council initiated this suit against its Indian constituents to divest their mineral interests. The trial court ruled in favor of the tribal council.[8] However, the Ninth Circuit reversed[9] holding the allottees acquired a vested interest in the minerals due to the "unconditional, non-contingent grant of these deposits to the allottees".[10] This appeal followed the Ninth Circuit's decision.

SUMMARY OF THE ARGUMENT

The Respondents claim a property right in the minerals underlying their allotment lands through the Northern Cheyenne Allotment Act. This act was passed to implement the allotment system on the Northern Cheyenne Indian Reservation. The allotment system was instituted for the avowed purpose of vesting property rights (ultimately fee title) in individual Indians. Consequently, the allotment rights at issue should be viewed in the context of a "pro-vesting" statutory purpose.

The legislative history of the 1926 allotment act depicts a Congressional design to presently vest—but delay possession—of the minerals at issue in the allottees. Indeed Congress rebelled from the proposed allotment of "surface rights only"[11] by granting a

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[8]Northern Cheyenne Tribe v. Hollowbreast, et al., 349 F.Supp. 1302 (D.C. Mont. 1972).

[9]Northern Cheyenne Tribe v. Northern Defendant Class of Allottees, Heirs and Devisees, 505 F.2d 268 271 (9th Cir. 1974).

[10]505 F.2d at 271.

[11]67 Cong. Rec. 6522 (1926).

remainder type interest to the allottees in, "unequivocal and non-contingent"[12] terms. In addition, Congress omitted from the mineral grant its often used proviso ("unless otherwise provided by Congress") retaining the power to extend tribal ownership. The deletion of this proviso, used in allotting most Montana reservations, further indicates a Congressional design to presently vest the allottees' mineral interest.

While Congress does have a broad "plenary" power over tribal property, Congress' powers are subject to the ordinary constitutional limitations, i.e., due process, when it affects the property rights of individual Indians. This limitation was specifically set forth in *Choate v. Trapp*, 224 U.S. 665 (1912). In the instant case, as in *Choate v. Trapp*, the Congressional divestment of individual Indians' rights in their allotment lands is violative of due process.

Congress clearly exceeded its plenary powers by passing the 1968 amendment because this amendment accomplishes a substantial taking for non-Indian purposes. If the coal is tribally owned a federal statute allows states to tax the coal. *Montana imposes a 30% tax on such coal!* Montana is under no obligation to use this revenue to benefit the Northern Cheyenne people. Hence tribal ownership will cause a 30% depletion of the Northern Cheyenne mineral estate to non-Indian use. However, if the allottees own the coal, it will be tax exempt according to *Squire v. Capoeman*, 351 U.S. 1 (1955). Consequently, only through allottees' ownership may the Northern Cheyenne mineral estate remain devoted fully to the benefit of the Northern Cheyenne people.

[12]These are the terms describing the grant of minerals from Judge Choy's decision below. Northern Cheyenne Tribe v. Northern Cheyenne Defendant Class of Allottees, Heirs and Devisees, 505 F.2d 268, 271 (9th Cir. 1974).

Finally Petitioner cites and quotes at length from numerous cases supporting Congress' plenary power over Indian affairs. However, the quotes or cases cited do not actually deal with individual Indian property rights. Hence Petitioner's authority does not free Congress from the dictates of due process governing the legislation and property rights, here at issue.

Consequently, the 1968 amendment's attempt to divest the allottees interest in the coal underlying their allotment land is unconstitutional as a taking without compensation.

ARGUMENT

I.

THE NINTH CIRCUIT DID NOT ERR BY RE-AFFIRMING THE PRINCIPLES SET FORTH IN CHOATE V. TRAPP APPLYING DUE PROCESS LIMITS TO CONGRESS' OTHERWISE PLENARY POWER OVER INDIAN AFFAIRS.

A. The Background Of The Allotment System Clarifies The Nature Of The Rights Involved.

This brief explanation of the Indian land allotment system and the type estates it produced is particularly important to a proper understanding of the rights here at issue. This is because the estates produced by the allotment system are peculiar to this narrow area of

federal regulation. Also Petitioner's claims asserting Congress' broad plenary power to re-allocate Indian property[13] rest upon a failure to properly *distinguish between Congress' power over individual Indians' property and Congress' power over communally held tribal property. This distinction is the key to resolving this case.*

Prior to their settlement on reservations, the Indians of the North Plains knew no exclusive property rights in real property. Rather, they viewed land as being for the communal, non-exclusive use and occupancy of its inhabitants.[14] When these people were settled on reservations, they continued to recognize the nonexclusive use and occupancy of land as a proper mode of tenure.

During the late 1800's it became apparent that most Indian reservations were being surrounded by the non-Indian culture. This presented several prevalent problems. The resulting increase of Indian/non-Indian contact was a source of constant friction due to the clashing cultural values. Also, the Indians were generally not accustomed to farming so they were not self-sufficient. These problems aroused Congressional concern as to how the large number of Indians on reservations might adapt to the ways of the non-Indian society they must inevitably live with.

The allotment system was developed as the plan to encourage Indians to become productive members of civilization by converting the Indian to the way of the white man.[15] Noting individual land ownership was

[13]Petitioner's Brief at Sec. 2-3.

[14]F. Cohen, *Handbook of Federal Indian Law*, 208 (1940).

[15]F. Cohen, *Handbook of Federal Indian Law*, 206-210 (1940).

essential to this cultural transition,[16] Congress implemented a system dividing tribal lands into parcels for ownership by individual Indians. This was the allotment system.[17]

The basic framework for the allotment system was set forth in the General Allotment Act (hereafter G.A.A.).[18] The G.A.A. was passed as a unilateral act of

[16]Commenting on Congress' Legislative motives, Mr. Cohen wrote: "That the leading proponents of allotment were inspired by the highest motives seems conclusively true. A Member of Congress, speaking on the Dawes Bill in 1886 said, 'It has * * * the endorsement of the Indian rights associations throughout the country, and of the best sentiment of the land.' The supreme aim of the friends of the Indian was to substitute white civilization for his tribal culture, and they *shrewdly sensed that the difference in the concepts of property was fundamental in the contrast between the two ways of life.* That the white man's way was good and the Indian's way was bad, all agreed. So, on the one hand, allotment was counted on to break up tribal life. This blessing was dwelt upon at length." F. Cohen, *Handbook of Federal Indian Law*, 208 (1940). (Emphasis added).

This Court described the transition of title under the allotment system as follows: "For a long period Congress pursued the policy of imposing as rapidly as possible, our system of individual land tenure on the Indian. To this end tribal or *communal land holdings of the Indians were superceded by allotment to individuals*, who were protected against improvidence by restrictions on alienation." Arenas v. United States, 322 U.S. 419, 420-21 (1944). (Emphasis added).

[17]For further accounts on the development of the allotment system see: J. Kinney, *A Continent Lost–A Civilization Won* (1937); D.S. Otis, *History of the Allotment Policy* (1934) found at the Hearings, Committee on Ind. Aff. 73rd Cong., 2d Session on H.R. 7902 (1934).

[18]Act of February 8, 1887, 24 Stat. 388.

Congress and was not negotiated with the tribes. Under the authority of the G.A.A. and other similar acts, several commissions were dispatched to the various reservations to implement the allotment system. These commissions negotiated the terms of allotment according to the demands presented by the size of the reservation, the land's potential for farming or ranching, the population of the tribe, the disposition of mineral resources, etc. Once the tribes agreed to the allotment terms, the agreement was then passed upon by Congress. Pursuant to such Congressional action, an act was passed implementing the allotment system on each reservation.[19]

In 1871 Congress shifted its method of conducting Indian affairs from treaty negotiations to unilateral regulation by statute.[20] After this transition, allotment acts were passed by Congress without securing the agreement of the tribe. The 1926 Northern Cheyenne Allotment Act, here at issue, was passed without such tribal agreement.

Hence the allotment system set forth a scheme for the transition of Indian lands from tribal ownership to ownership by individual Indians. This transition had several phases.[21] In each successive phase, the allottee

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[19]See *Choate v. Trapp*, 224 U.S. 665 (1912) for a description of this process.

[20]Act of March 3, 1871, 16 Stat. 566, codified at 25 U.S.C. 71.

[21]These allotment acts typically provided for the reservation to be surveyed into tracts. Enrolled members of the tribe could select a parcel as their allotment. Upon approval of such allotment by the Secretary of the Interior a trust patent issued on said allotment, and upon the expiration of the 25 year restraint on alienation, the Indian could receive a fee patent on the land.

acquired more complete title until finally he could take a fee patent.

So long as the land was *tribal* land, the individual Indian had no vested right in such land.[22] However, once the individual Indian chose and filed his application for the allotment, the land was removed from tribal ownership.[23] The *allottee's rights in the land vested when the allottee selected the parcel and filed a proper application.*[24] Once the application was approved, the trust patent issued. The period governing the restraint on alienation commenced upon issuance of the trust patent.[25] Under the trust patent the United States held legal title as guardian of the allottee while the allottee held equitable title to the land.[26] The

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[22]United States v. Jim, 409 U.S. 80 reh.den. 409 U.S. 1118 (1972); Chippewa Indians v. United States, 307 U.S. 1 (1938); Chase Jr. v. United States, 256 U.S. 1 (1921); Nadeau v. Union Pacific Railroad, 253 U.S. 442 (1920); Sizemore v. Brady, 235 U.S. 441 (1914); Gritts v. Fisher, 224 U.S. 640 (1912); also see F. Cohen, *Handbook of Federal Indian Law*, 138-84 (1940).

[23]Raymond Bear Hill, 52 I.D. 688 (1929).

[24]The Indian's rights in his allotment prior to issuance of the initial patent are recognized in *Arenas v. United States*, 322 U.S. 419 (1944); *Sizemore v. Brady*, 235 U.S. 441 (1914); *Ballinger v. United States*, 216 U.S. 240 (1909); *Hy-Yu-Tse-Mil-Kin v. Smith*, 194 U.S. 401 (1904); *Elwood v. Flannigan*, 14 Otto 562 (1882); *Crews v. Burcham*, 1 Black 352 (1862); *Doe v. Wilson*, 23 How 457 (1859); *United States v. Arenas*, 158 F.2d 730 (9th Cir. 1946) cert. denied 331 U.S. 842 (1947); *Leecy v. United States*, 190 F. 289 (8th Cir. 1911); *Pka-O-Wah-Ash-Kum v. Sorin*, 8 F. 740 (C.C.N.D.Ill. 1881); *Rights of Indians to Allotments In San Juan County, Utah*, 57 I.D. 547 (1942); *Allotment Sections on the Fort Belknap Indian Reservation*, 55 I.D. 295 (1935) and *Raymond Bear Hill*, 52 I.D. 688 (1929).

[25]United States v. Reynolds, 250 U.S. 106 (1918).

[26]Act of Feb. 8, 1887, 24 Stat. 388(5); Payne v. New Mexico, 255 U.S. 367 (1921); Rights of Indians to Allotments in San Juan County, Utah, 57 I.D. 547 (1942).

allottee's equitable title is regarded as fee title[27] subject to a restraint on alienation[28] enforced by the government.[29] The *allottee's title under a trust patent was also predominant over any interest the tribe,*[30] the federal government[31] or other individuals[32] may claim in such land. Such rights *including minerals*[33] are specifically *protected by the Constitution.*[34] Ownership

[27]Arenas v. United States, 322 U.S. 419, 421 (1944); Mott v. United States, 283 U.S. 747, 749 (1931); United States v. Payne Lumber Co., 206 U.S. 467, 473 (1907); United States v. Minnesota, 113 F.2d 770, 773 (8th Cir. 1940); and Fish v. Wise, 52 F.2d 544 (10th Cir. 1931) cert. denied 282 U.S. 903 (1931).

[28]Act of February 8, 1887, 24 Stat. 388.

[29]Heckman v. United States, 224 U.S. 413 (1912).

[30]In *Fish v. Wise,* 52 F.2d 544 (10th Cir. 1931) cert. denied, 282 U.S. 903 (1931) the Tenth Circuit specifically *rejected a tribe's attempt to reallocate the mineral estate of Indian allottees.* See also *Leecy v. United States,* 190 F. 289 (8th Cir. 1911).

[31]Arenas v. United States, 322 U.S. 419 (1944); Choate v. Trapp, 224 U.S. 665 (1912); Gleason v. Wood, 224 U.S. 679 (1912); English v. Richardson, 224 U.S. 680 (1912); Mullen v. United States, 224 U.S. 488 (1912); Ballinger v. United States, 216 U.S. 240 (1909); Leecy v. United States, 190 F. 289 (8th Cir. 1911); Rights of Indians to Allotment in San Juan County, Utah, 57 I.D. 547 (1929); Allotment Sections on the Fort Belknap Indian Reservation, 55 I.D. 295 (1935); and Raymond Bear Hill, 52 I.D. 688 (1929).

[32]Hy-Yu-Tse-Mil-Kin v. Smith, 194 U.S. 401 (1904); Jones v. Meehan, 175 U.S. 1 (1899); Sizemore v. Brady, 235. U.S. 441 (1914); and Mott v. United States, 283 U.S. 747 (1931).

[33]Mott v. United States, 283 U.S. 747 (1931).

[34]Among the cases *expressly* proclaiming Constitutional protection of individual Indian's property rights are: *Supreme Court*–Oklahoma Tax Comm'n. v. United States, 319 U.S. 598, 603 (1943); County of Mahnomen v. United States, 319 U.S. 474, 476 (1943); Mott v. United States, 283 U.S. 747, 752

of minerals will be inferred to pass to Indians upon silence of the statute.[35] Federal restrictions on such

(1931); Carpenter v. Shaw, 280 U.S. 363, 365, 366 (1929); Sizemore v. Brady, 235 U.S. 441, 449 (1914); Ward v. Love County, 253 U.S. 17, 20, 21 (1919); Williams v. Johnson, 239 U.S. 414, 419 (1915); Choate v. Trapp, 224 U.S. 665 (1912); Gleason v. Wood, 224 U.S. 679 (1912); English v. Richardson, 224 U.S. 680 (1912); Jones v. Meehan, 175 U.S. 1 (1899)–*Court of Appeals*–United States v. Benewah County, Idaho, 290 F. 268 (9th Cir. 1923); Kirkwood v. Arenas, 243 F.2d 863, 869 (9th Cir. 1957); Board of County Commissioners v. United States, 152 F.2d 540, 542 (10th Cir. 1945); Board of County Commissioners v. Seben, 130 F.2d 663, 668 (10th Cir. 1941); Landman v. Comm'n Internal Revenue Service, 123 F.2d 787, 790 (10th Cir. 1941); Bryan County, Oklahoma v. United States, 123 F.2d 782, 784 (10th Cir. 1941); Glacier County, Montana v. United States, 99 F.2d 733, 734 (9th Cir. 1938) (does not cite *Choate,* but states the general proposition as to tax exemptions and vested rights, and cites a previous Ninth Circuit case, United States v. Nez Perce County, 95 F.2d 232 (9th Cir. 1938) in which *Choate* is cited); United States v. Nez Perce County, 95 F.2d 232 (9th Cir. 1938); Board of Commissioners of Tulsa County, Oklahoma v. United States, 94 F.2d 450, 451 (10th Cir. 1938); Morrow v. United States, 243 F. 854, 856 (8th Cir. 1917)–*District Court, Court of Claims*–Agua Caliente Band of Mission Indians v. County of Riverside, 306 F.Supp., 279, 284 (C.D. Calif. 1969); Choctaw Nation v. United States, 100 F.Supp. 318, 320 (Ct. Cl. 1951); Taunah v. Jones, 90 F.Supp. 459, 463 (W.D. Okla. 1950); United States v. Ferry County, Washington, 39 F.Supp. 1007, 1010, 1011, 1012 (E.D. Wash. 1941); United States v. Spaeth, 24 F.Supp. 465, 467 (D. Minn. 1938); United States v. Ferry County, Washington, 24 F.Supp. 399, 400 (E.D.Wash. 1938); McIntire v. United States, 22 F.Supp. 316, 320 (D. Mont. 1936); United States v. Powers, 16 F.Supp. 155, 162 (D. Mont. 1936).

[35]United States v. Shoshone Tribe, 304 U.D. 111 (1938).

land will not be readily inferred but must be specifically authorized prior to the vesting.[36]

However, the Indian, as a ward of the federal government, was subject to certain restrictions. Consequently, the allottee could not alienate the land so long as the federal government held the land so long as the federal government held the land in trust. Once the period for holding the land in trust had expired, a patent in fee, free of all encumbrance, could be issued to the allottee or his heirs.[37]

Not all reservation land was allotted. Some was sold to non-Indian homesteaders and some remained under tribal ownership. In 1934 the allotment of tribal land ceased.[38]

Consequently, there are presently several types of ownership of reservation land: land which had been allotted and is in individual Indian ownership; land owned by non-Indian individuals and; land which is not allotted and remains in tribal ownership.

Thus, *commonly held tribal land is a very different estate than the individually owned Indian allotments (here at issue).*[39]

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[36]Mullen v. United States, 224 U.S. 448 (1912); Wilson v. Wall, 6 Wall. 83 (1867); Doe v. Wilson, 23 How. 457 (1859); Adams v. Osage Tribe, 59 F.2d 653 (10th Cir. 1932); Leecy v. United States, 190 F. 289 (8th Cir. 1911); and F. Cohen, *Handbook of Federal Indian Law*, 97 (1940).

[37]Act of February 8, 1887, 24 Stat. 388 (5); 25 C.F.R. 121.

[38]Act of June 18, 1934, 48 Stat. 984.

[39]"Reservation land is divided into two classes: land allotted to individual Indian for the use and benefit of the allottee; and common tribal land used for the benefit of the entire community". C.I.R. v. Walker 326 F.2d 261, 262 (9th Cir. 1964).

As a result, Congress may not indiscriminantly exercise its control over reservation lands. Rather, the extent to which Congress may exercise control over such land depends on the type ownership of the land. Congress may re-allocate benefits of *tribal* land within the tribe as it pleases[40] but may only manage *individual property (here at issue) subject to the constitutionally protected property rights of the individual owners.*[41]

B. The Constitutional Protection Of Respondents' Interest In The Mineral Estate Is Established In Choate v. Trapp.

(1) Choate v. Trapp And Gritts v. Fisher When Read Together Explain But Limit Congress' Plenary Power Over Indians By Providing Due Process Protection Of Individual Indian Property Rights.

While Congress does possess a broad plenary power when dealing with Indians collectively, as tribal bodies, such plenary power is restricted by ordinary constitutional limitations when governing the rights of Indians as individuals and as citizens.[42] The extent of and

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[40]The reason for this being that no individual's rights have vested to interfere with such re-allocation. See *United States v. Jim*, 409 U.S. 80 reh. den. 409 U.S. 1118 (1972); *Gritts v. Fisher*, 224 U.S. 640 (1912).

[41]Choate v. Trapp, 244 U.S. 665 (1912). English v. Richardson, 224 U.S. 680 (1912). Also see cases cited in footnote 34.

[42]Among the cases *expressly* proclaiming Constitutional protection of individual Indian's property rights are: *Supreme Court*–Oklahoma Tax Comm'n. v. United States, 319 U.S. 598, 603 (1943); County of Mahnomen v. United States, 319 U.S. 474, 476 (1943); Mott v. United States, 283 U.S. 747, 752

limitation of this "plenary" power was set forth in the landmark cases of *Choate v. Trapp*, 224 U.S. 665 (1912) and *Gritts v. Fisher*, 224 U.S. 640 (1912). Analysis of these two opinions proves the Ninth Circuit's decisic below correct.

While *Choate v. Trapp* and *Gritts v. Fisher* were not companion cases as such, it is most informative to read the two decisions together. Both cases were argued within a two month period and both decisions were announced the same day. Both involved rights of individual Indians, *Gritts* in tribal property, and *Choate* in individually owned allotment land. Both cases were on the Justices' minds when the cases were decided and when the decisions were being drafted. And both decisions were specifically drafted to acknowledge and compliment the ruling of the other.

Choate v. Trapp is particularly important. Since both *Choate* and the instant case involve individual Indians' property rights in trust allotments *Choate* should control disposition of the respondent/allottees' rights in the mineral estate. Indeed, this was the result in the Ninth Circuit's decision below.

In *Choate*, members of the Choctaw and Chickasaw Nations received individual trust allotments pursuant to the Curtis Act. The Curtis Act also provided the lands would be tax exempt for twenty-five years. A later federal statute repealed this tax exemption, before expiration of the twenty-five year period. In *Choate* this Court struck down the tax repealing statute. The rationale was the tax exemption, as a property right in the allotment, was—immune from uncompensated divestment according to due process.

The *Choate* decision is controlling for several reasons. *First Choate* protected Indians' rights in their individually owned property. The Court recognized:

> "There have been comparatively few cases which discuss the legislative power over private property held by Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His *private rights* are secured and enforced *to the same extent in the same way as other residents or citizens of the United States.*" Choate v. Trapp, 224 U.S. at 677. (Emphasis added)

(1931); Carpenter v. Shaw, 280 U.S. 363, 365, 366 (1929); Sizemore v. Brady, 235 U.S. 441, 449 (1914); Ward v. Love County, 253 U.S. 17, 20, 21 (1919); Williams v Johnson, 239 U.S. 414, 419 (1915); Choate v. Trapp, 224 U.S. 665 (1912); Gleason v. Wood, 224 U.S. 679 (1912); English v. Richardson, 224 U.S. 680 (1912); Jones v. Meehan, 175 U.S. 1 (1899)–*Court of Appeals*–United States v. Benewah County, Idaho, 290 F. 268 (9th Cir. 1923); Kirkwood v. Arenas, 243 F.2d 863, 869 (9th Cir. 1957); Board of County Commissioners v. United States, 152 F.2d 540, 542 (10th Cir. 1945); Board of County Commissioners v. Seben, 130 F.2d 663, 668 (10th Cir. 1941); Landman v. Comm'n Internal Revenue Service, 123 F.2d 787, 790 (10th Cir. 1941); Bryan County, Oklahoma v. United States, 123 F.2d 782, 784 (10th Cir. 1941); Glacier County, Montana v. United States, 99 F.2d 733, 734 (9th Cir. 1938) (does not cite *Choate*, but states the general proposition as to tax exemptions and vested rights, and cites a previous Ninth Circuit case, United States v. Nez Perce County, 95 F.2d 232 (9th Cir. 1938) in which *Choate* is cited); United States v. Nez Perce County, 95 F.2d 232 (9th Cir. 1938); Board of Commissioners of Tulsa County, Oklahoma v. United States, 94 F.2d 450, 451 (10th Cir. 1938); Morrow v. United States, 243 F. 854, 856 (8th Cir. 1917)–*District Court, Court of Claims*–Agua Caliente Band of Mission Indians v. County of Riverside, 306 F.Supp., 279, 284 (C.D. Calif. 1969); Choctaw Nation v. United States, 100 F.Supp. 318, 320 (Ct. Cl. 1951); Taunah v. Jones, 90 F.Supp. 459, 463 (W.D. Okla. 1950); United States v. Ferry County, Washington, 39 F.Supp. 1007, 1010, 1011, 1012 (E.D. Wash. 1941); United States v. Spaeth, 24 F.Supp. 465, 467 (D. Minn. 1938); United States v. Ferry County, Washington, 24 F.Supp. 399, 400 (E.D.Wash. 1938); McIntire v. United States, 22 F.Supp. 316, 320 (D. Mont. 1936); United States v. Powers, 16 F.Supp. 155, 162 (D. Mont. 1936).

Such property rights are constitutionally protected from divestment including diminishment or "re-allocation."[43]

> "Under the provisions of the Fifth Amendment there was no more power to deprive him of the exemption than other rights in the property. No statute would have been valid which reduced his fee to a life estate or attempted to take from him ten acres, or fifty acres, or the timber growing on the land . . . *It is conceded that no right which was actually conferred upon the Indian can be arbitrarily abrogated by statute.*" Choate v. Trapp, 224 U.S. at 674. (Emphasis added)

Thus rights of individual Indians in their individually owned property is protected by due process.

The *second* important point in *Choate* is the type estate protected.

The rights in *Choate* were the *rights of individual Indian allottees in their land held under TRUST ALLOTMENTS.*[44] This is the *same interest and the SAME TYPE ESTATE presented by the Respondent/ Allottees in the case at bar.* Consequently, *Choate* compels a recognition of the constitutional protection afforded the very estates now before this Court. This in

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[43]The fact that diminishment, hence "re-allocation" of individual property is prohibited is particularly important in light of the trial court's attaching considerable importance to this just being a "re-allocation" somehow removing the divestment problem. See *Northern Cheyenne Tribe v. Hollowbreast,* 349 F.Supp. 1302, 1311 (D. Mont. 1972).

[44]Only under trust allotments are restraints on alienation imposed (See n. 28). The later statute allowing taxation also attempted to remove this restraint. Since the rights must have vested prior to passage of this later statute, such rights must have vested in trust allotments.

turn compels affirmance of the Ninth Circuit's decision below.

The *third* important point in *Choate v. Trapp* is that *both Choate and the instant case* involved *divesting by a federal statute.* Thus *Choate* protects against action by the federal government. This is important because only the federal government has the broad plenary powers resulting from its guardianship relation to the Indians.[45]

Consequently, *Choate* specifically limits Congress' otherwise broad plenary powers by attaching due process requisites to allotment statutes. This point was emphasized by *Choate's* rejecting Petitioner's "plenary" power argument when weighed against the constitutional rights of Indian individuals.

> ". . . . it was said that incompetent persons, though citizens, may not have the full right to control their property and there was nothing in citizenship incompatible with guardianship, ... But there *was no indication that the power of wardship conferred authority on Congress to lessen any of the rights of property which have been vested in the individual Indian* by prior laws or contracts. Such rights are *protected from repeal by the provisions of the Fifth Amendment.*" Choate v. Trapp, 224 U.S. at 578. (emphasis added)

Thus, *Choate* specifically limited the plenary power upon which the Petitioner relies.

The *Choate* decision and the Ninth Circuit's decision below parallel each other in many respects: both

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[45]*Worcester v. Georgia,* 6 Pet. 515 (1832) held the federal government is guardian of the Indians, such guardianship being immune from interference by the states. See also *Williams v. Lee,* 358 U.S. 217 (1959), and *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164 (1973).

involve individual Indians' property rights; both involve property rights in trust allotments; both affirm the existence and protection of such rights; both reject attempts to divest such rights by a later federal statute; and both limit the federal government's plenary powers as guardian of the Indians private property. In the face of these parallels *Choate* clearly controls the disposition of the instant case. Consequently, the Ninth Circuit's decision below is correct.

Gritts v. Fisher, 224 U.S. 640 (1912) compliments *Choate* in defining the extent of individual Indians' rights in tribal property and conversely in defining the extent of Congress plenary power to manipulate such property.

In *Gritts* enrollment in the tribal rolls closed on a given date. Only those enrolled prior to that date were legally members of the tribe. The tribal land was to be allotted among the enrolled members. The left over tribal land was to be sold to homesteaders with the proceeds to be distributed among the enrolled members. A later statute re-opened the tribal rolls to permit additional enrollment. The original enrollees sued to prevent diminishment of their share of funds from liquidation of the *tribal property*. Hence, the issue in *Gritts* was: Did the original enrollees have a vested right in the proceeds from *tribal* property? This Court answered, "NO". While an individual Indian holds no vested right in tribal property, the *Gritts* decision carefully pointed out it deals *only with tribal property*, not with individual allotments.[46] In fact the *Gritts*

[46]"It is not proposed to disturb the individual allotments. . . ." Gritts v. Fisher, 224 U.S. at 647. And again: "As has been indicated their individual allotments are not affected". Id. at 648.

decision expressly *disclaimed any right to re-allocate individual property*, in recognition of the *Choate* decision.

> ". . . It is conceded, and properly so, that the latter *legislation is valid and controlling unless it impairs or destroys rights which the act of 1902 vested* in members living September 1, 1902, and enrolled under that act. *As has* been indicated, *their individual allotments are not affected.*" Gritts v. Fisher, 244 U.S. 640, 648 (1912). (emphasis added)

Similarly, the *Choate* decision expressly recognized the *Gritts* holding[47] denying individual rights in tribal property.

In conclusion *Gritts* announced Congress' plenary power over *tribal* property but specifically limited such plenary power to tribal property.

In conclusion, *Choate* recognized vested rights in individually owned allotments while *Gritts* gave Congress plenary power over tribal property. Since *Choate* and *Gritts* dealt with different types of estates, they do not contradict each other. Instead both *Choate* and *Gritts* specifically acknowledge the holding of the other. In so doing, these opinions compliment one another, recognizing Congress' plenary power over tribal property but restricting such power when it prejudices individual property rights. Understanding this limitation on Congress' plenary power is crucial in examining the allotment rights here at issue.

[47]*Choate v. Trapp*, states "The individual Indian has *no* title or enforceable right in tribal property." 224 U.S. at 671.

(2) The Decision In Choate v. Trapp Is Based On Statutory, Not Contractual Rights.

Petitioner claims *Choate v. Trapp*, deals only with contract rights, hence is inapplicable to the rights at issue.[48] While the dicta of a few decisions may misread *Choate* in this respect, this "contract right" interpretation of *Choate* is rejected by:

The specific language of *Choate v. Trapp;* The specific language of *Gritts v. Fisher;* Substantial case law following the *Choate* decision;

Interpretation by the leading scholar in the field, and;

The expanded set of interests currently protected by due process.

(a) The Tribal "Contract" Rights Theory Of Choate v. Trapp Is Rejected By The Specific Language Of The Choate Decision.

In *Choate* the agreement or "contract" between the government and tribe was the "Atoka agreement". Petitioner claims the Atoka agreement was the source of the allottees' rights in *Choate*. The Curtis Act was the allotment act authorizing the allotments involved in *Choate*. Respondent submits the Curtis Act rather than the Atoka agreement was the source of the rights in *Choate*. In support of this claim, please note that the language of the *Choate* decision specifically disclaims

[48]See Petitioner's Brief at Sec. 3. Since the Northern Cheyenne Allotment Act was not based on an agreement with the tribe, Petitioner assumes the rights present in *Choate v. Trapp* are not applicable to the instant case.

any reliance on any "contract" rights of the Atoka agreement. The Court stated:

> "The *question* in this case, therefore, is *not whether the plaintiffs were parties to the Atoka Agreement, but whether* they had not *acquired rights under the Curtis Act which are now protected by the Constitution of the United States.*" Choate v. Trapp, 224 U.S. at 671. (Emphasis added)

This quote spells out that contract rights (the Atoka agreement) were not at issue. Rather, statutory based property rights (the Curtis Act) were at issue. Hence, the *Choate* decision itself conclusively rejects the "contract" theory submitted by Petitioner. Also other language in the *Choate* decision re-affirms the allotment act as the source of the allottee's rights.[49]

While there is language in *Choate* analogizing application for an allotment to the contractual process, 224 U.S. at 672, this explanation explains the *statute* as the offer, and application for the allotment, as acceptance. The Atoka agreement is not part of this contractual analogy. However, such contract discussions must be interpreted only as analogy, not as the basis for allotment rights.

[49]For instance: "Those who signed the patent could not convey more *rights* than they were *granted by that part of the Curtis Act*...." 224 U.S. at 673 (emphasis added). And; "The patent issued in *pursuance of those statutes gave the Indian as good a title* to the exemption as it did to the land itself." 224 U.S. at 673-74. (Emphasis added).

(b) Petitioner's Tribal "Contract" Rights Theory Of Choate v. Trapp Is Rejected By the Express Language Of Gritts v. Fisher.

As mentioned earlier, *Gritts v. Fisher* was the companion decision of *Choate v. Trapp*. Apparently the "contract" theory of Indian rights was argued in both cases. The *Gritts* decision rejected the "contract" theory by noting:

> "The difficulty with the appellant's contention is that it *treats the act of 1902 as a contract, when 'it is only an act of Congress and can have no greater effect.'* " Gritts v. Fisher, 224 U.S. at 648. (emphasis added)

How could this Court have made its decision any clearer? Manifestly, the statute rather than the tribal agreement must serve as the basis for any individual rights. This is squarely at odds with Petitioner's "contract" theory.

(c) Petitioner's Tribal "Contract" Theory Of Choate v. Trapp Is Rejected By Substantial Case Law Following Choate.

Substantial case law has both affirmed the statutory nature of the rights in *Choate* and rejected Petitioner's tribal "contract" theory of such rights. Initially, *English v. Richardson*, 224 U.S. 680; *Ward v. Love County*, 253 U.S. 17 (1920) and *Carpenter v. Shaw*, 280 U.S. 363 (1929) were all decided by this Court, all involved the very same statutory tax exemption as *Choate* and all expressly interpreted *Choate* as recognizing statutory based property rights.

In *English v. Richardson*, this Court stated: "The right to the plaintiff to the exemption *granted by Congress* is protected by the Constitution on principles stated and applied in *Choate v. Trapp.*" 224 U.S. at 681. (Emphasis added). The fact that this Court acknowledged these rights as "granted by Congress" indicates these rights were statutory rights.

Again in *Ward v. Love County*, this Court stated:

> "This was settled in *Choate v. Trapp* . . . and was also settled in those cases that the exemption was a vested property right *arising out of a law of Congress and protected by the Constitution* of the United States . . . through the pending suits and otherwise they were objecting and protesting taxation of their lands which had *been forbidden by a law of Congress.*" 253 U.S. at 20, 23. (Emphasis added)

And still again in *Carpenter v. Shaw*, this Court referred to *Choate* stating:

> "It was there held that the provision for the exemption conferred upon the allottees' *property rights* which were within the protection of the Fifth Amendment and hence it was not subject to repeal by later Congressional legislation; . . . ." 280 U.S. at 365-66 (1929). (Emphasis added)

Thus, when this Court has specifically referred to the source of the rights in *Choate*, such rights have been repeatedly characterized as statutory property rights.

In addition to *Choate* and *Gritts* numerous cases have rejected Petitioner's "contract" theory. For example *United States v. Rowell*, 243 U.S. 464 (1917) evidently heard but rejected such "contract" argument by surmising:

> "Besides, statutes of this type are not to be regarded as proposals by the government to enter

into executory contracts, but as laws which are amendable and repealable at the will of Congress, save that rights created by carrying them into effect cannot be divested or impaired. Gritts v. Fisher, supra; Choate v. Trapp, 224 U.S. 665, 671, . . . Sizemore v. Brady, 235 U.S. 441, 449." 243 U.S. at 470.

Similarly, *Sizemore v. Brady*, 235 U.S. 441 (1914) rejected such contract rights, holding that allotment rights don't vest until the allotment is actually applied for as provided by the statute. See infra at I.C. for the discussion of *Sizemore*.

Also *Starr v. Long Jim*, 227 U.S. 614 (1913) considered but rejected arguments favoring allotment rights pursuant to a tribal agreement. Long Jim held land governed by both the Moses Agreement (a tribal agreement with the federal government) and an allotment act. This decision specified that Long Jim took no vested rights under the Moses Agreement. Further, the allotment act, was the source of such rights served to restrict the provisions of the Moses Agreement. The entire approach in *Starr v. Long Jim*, is impossible to reconcile with Petitioner's tribal "contract" theory of allotment rights.

(d) Petitioner's "Contract" Rights Theory of Choate v. Trapp Is Rejected By The Interpretation Of The Leading Scholar In The Field.

On several occasions in his noted treatise, *The Handbook of Federal Indian Law*, Felix Cohen specifically interprets *Choate* as protecting private property rights.

"As in the case of *private property* generally, Congress cannot deprive an Indian of his land or any interest therein without due process of law or take such property for public purposes without just compensation. *An outstanding decision on the subject is Choate v. Trapp*. . . . F. Cohen, *Handbook of Federal Indian Law*, 97-98 (1940). (Emphasis added)

Also,

"Under the United States Constitution, the rights of the Indian in his *private property*, whatever they may be, are secured and enforced to the same extent and in the same way as other residents or citizens of the United States." Id. at 195. (emphasis added) (citing *Choate v. Trapp*)

with such rights stemming from a statute.

"The principle of construction in favor of Indians is also applied to Congressional statutes", F. Cohen, *Handbook of Federal Indian Law*, 172 (1940), (citing *Choate v. Trapp*, as authority for this proposition.)

"The *leading case of Choate v. Trapp*, held that under *this statute* allottees acquired a *vested property right* to exemption from state taxation . . . and could not be impaired by subsequent Congressional action without violation of the Fifth Amendment of the Federal Constitution." Id. at 437. (Emphasis added)

Mr. Cohen is undoubtedly the foremost expert in this field to date.[50] Accordingly, his interpretation should be most persuasive, and is indeed correct.

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[50]This Court recognized Mr. Cohen as an "acknowledged expert" in *Squire v. Capoeman*, 351 U.S. 1, 9 (1955).

(e) "Contractual" vs. "Non-Contractual Categorization Of Allotment Rights Cannot Remove Such Rights From The Scope Of Due Process Protection.

Petitioner *implies* that because the Northern Cheyenne allotment rights are not contract rights, they do not fall within the ambit of *Choate v. Trapp's* due process protection. Even assuming this arguendo the Petitioner's "contract" theory does not undermine the allottee's rights for two reasons.

First, at the time when *Choate* was decided, due process protected both contract rights and property rights. The allottee's rights became property rights during the 1930's.[51] Consequently, *Choate* protects the rights at issue as property rights even using the restricted set of interests protected by due process at that time.

Second, the argument that conventional property or contract rights are necessary to invoke due process protection has become moot. When *Choate* was decided an interest in property must fit into either a technical contract or property category to receive due process protection. Otherwise, the interest would be deemed a "privilege" or "gratuity" not protected by due process. However, in recent years the "privilege doctrine" has whithered substantially.[52] Today, it is established that interests flowing solely from a statutory "offer" are

[51]See infra at Sec. I.C.

[52]Fleming v. Nestor, 363 U.S. 603 (1960); Sherbert v. Verner, 374 U.S. 398 (1963); Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969); Graham v. Richardson, 403 U.S. 365 (1971); and Morrissey v. Brewer, 408 U.S. 471 (1972).

protected by the Constitution,[53] including the requisites of due process.[54] Indeed, just last term this Court held that "contractual" vs. "non-contractual" characterization of a statutory benefit does not affect its constitutional protection.

> "We do not *see how the fact that social security benefits are 'non-contractual' can sanction differential protection* for covered employees which is solely gender-based." Weinberger v. Wiesenfeld, ___ U.S. ___, 42 L.Ed. 514 (March 19, 1975). (Emphasis added)

Consequently, due process protection attached.

Analogously, the allottees availed themselves of a statutory offer. In response the government conferred the benefit of land ownership. By issuing the trust patents the government has specifically approved each specific beneficiary. Consequently, today a constitutionally protected entitlement has accrued to the allottees by virtue of their bringing themselves within the class benefited by the statute.

[53]Sherbert v. Verner, 374 U.S. 398 (1963); Shapiro v. Thompson, 394 U.S. 618 (1969); Jiminez v. Weinberger, 417 U.S. 628 (1974) and Graham v. Richardson, 403 U.S. 365 (1971).

[54]Goldberg v. Kelly, 397 U.S. 254 (1970); Wheeler v. Montgomery, 397 U.S. 280 (1970); and Arnett v. Kennedy, 416 U.S. 134 (1974).

C. Respondent's Rights In Their Allotments Vested When They Selected The Land And Submitted Their Application For The Trust Patent.

The Petitioner claims *Choate v. Trapp*, is inapplicable to the rights at issue because *Choate* only applies to completed allotments.[55] This argument raises the question: When do the allottees' rights in the allotment vest?

While the *Choate* decision held the allottees' rights under trust patents were vested, it did not specify the moment of vesting. Several years later *Sizemore v. Brady*, 235 U.S. 441 (1914) roughly determined the time of vesting. In *Sizemore*, the issue was: when did the allotment enter the decedent's estate? This Court held the allotment entered the estate when "selected or made"[56] on behalf of his estate. Consequently, the decedent's interest vested when the allotment was "selected or made".

The Department of the Interior was then left to decide when an allotment was made. Numerous Department of the Interior decisions held the allotment was made for purposes of vesting the allottees' rights when the allotment application was filed with the local office. See *Rights of Indians to Allotment in San Juan County, Utah*, 57 I.D. 547 (1942); *Allotment Selections on the Fort Belknap Indian Reservation*, 55 I.D. 295 (1935); *Raymond Bear Hill*, 52 I.D. 688 (1929). This rule was not limited to Indian allotments. Indeed, in conveyances with the federal government as grantor, the

[55]Petitioner's Brief at Sec. 3.

[56]235 U.S. at 451.

grantees' rights were considered vested upon filing a proper application, be the applicant an Indian,[57] a private non-Indian party[58] or a State.[59] Thus, vesting upon filing the application was a very broad rule.

Vesting accrued upon filing the application despite recognition of such rights being contrary to later policies of Interior,[60] or despite such rights being abrogated by subsequent statute.[61]

Consequently, change in the law by statutory amendment could only affect land covered by applications filed after the effective date of the act.[62]

While long established case law acknowledged vesting prior to issuance of the patent,[63] this Court finally pinpointed the moment of vesting for an Indian allotment in the case of *Arenas v. United States*, 322

[57]Raymond Bear Hill, 52 I.D. 688 (1929).

[58]Payne v. Central Pacific Ry. Co. 255 U.S. 489 (1920); Benson Min. & Smelting Co. v. Alta Min. & Smelting Co., 145 U.S. 428 (1892).

[59]Wyoming v. United States, 255 U.S. 489 (1920) and Payne v. New Mexico, 255 U.S. 367 (1920).

[60]Arenas v. United States, 322 U.S. 419 (1944) and Ballinger v. United States, 216 U.S. 240 (1909).

[61]Wyoming v. United States, 255 U.S. 489 (1920); Payne v. New Mexico, 255 U.S. 367 (1920); Allotment Selections on the Fort Belknap Indian Reservation, 55 I.D. 295 (1935); and Raymond Bear Hill, 52 I.D. 688 (1929).

[62]Raymond Bear Hill, 52 I.D. 688 (1929).

[63]Ballinger v. United States, 216 U.S. 240 (1909); Hy-Yu-Tse-Mil-Kin v. Smith, 194 U.S. 401 (1904); Elwood v. Flannigan, 14 Otto 562 (1882); Crews v. Burcham, 1 Black 352 (1862) and Doe v. Wilson, 23 How. 457 (1859).

U.S. 419 (1944). Arenas filed his application for an allotment, but the Secretary of Interior refused to issue the trust patent. This Court held that Arenas' rights vested upon filing his application so the Secretary must honor those rights by issuing the patent. So at last in *Arenas* it is established beyond doubt that Indian allottees' rights vest upon filing their allotment application.

As applied to the instant case the issue becomes; when did the Northern Cheyenne allottees apply for their allotments? While no exact dates are available, the applications must have been filed by June 18, 1934. This is because the Wheeler Howard Act which became effective on June 18, 1934 stopped allotment of tribal land.[64] Only allotment applications filed prior to that date were approved.[65] As a result all the Northern Cheyenne allottees must have filed their applications by June 18, 1934. Since all the allotment rights vested as of that date, the vesting and the protection afforded by *Choate v. Trapp* have applied to the allotments at issue for the past twenty-six years.

[64]Act of June 18, 1934, 48 Stat. 984.

[65]Allotment Selections on the Fort Belknap Reservation, 55 I.D. 295 (1935).

II.

THE 1926 ALLOTMENT ACT OPERATED TO CONVEY AN IMMEDIATELY VESTING (UPON FILING THE ALLOTMENT APPLICATION) INTEREST IN THE MINERALS AT ISSUE.

A. The Legislative History Of The 1926 Act Reveals That Congress Knowingly Rejected Any Proposed Delay In Vesting The Minerals Underlying Allotment Lands.

The Department of Interior was originally opposed[66] to any allotment of the Northern Cheyenne Indian Reservation but evidently bowed to the wishes of Senator Walsh of Montana in consenting to support this bill.[67] As a result the original version of the allotment act was narrowly drafted.

The major Congressional examination of this bill occurred in the Senate Committee on Indian Affairs. In the course of examining this bill the Committee substantially re-wrote it.[68] Congress agreed to the

[66]Appendix at A.

[67]See the letter from Secretary of Interior Mr. Hubert Work at Sen.Rep.No. 638, 69th Cong. 1st Sess. 3 (1926).

[68]The Senate Committee on Indian Affairs in re-writing this bill substantially broadened the benefits conferred on the allottees. In addition to expanding the allotment from "only the surface" to include the remainder interest in minerals, the Committee also increased the size of allotment plots from 80 to 160 acres, provided for per capita payments for designating town sites and for the sale of lots in such town sites. Also the bill as it emerged from this committee is set forth at 67 Cong. Rec. 9735 (1926).

amendments made by this Committee so the Committee's sentiments were officially concurred in. Since the Senate Committee on Indian Affairs was the fulcrum of Congress' inquiry and action in revising this 1926 allotment act, it is significant to examine the changes in the bill's mineral provisions as presented to the Committee and as finally reported out.

The section disposing of the mineral estate, when presented to the Committee read:

> "*Provided*, however, That *only the surface of any lands* in this reservation *may be allotted*, and all minerals on said lands are hereby reserved for the benefit of the Tribe: *Provided, further*, That *at the expiration of fifty years* from the date of the approval of this Act, the coal or other mineral deposits of said allotments *shall become the property of the respective allottees* or their heirs or assigns." (Emphasis added) [69]

Note the proposed bill provided for allotment of "*. . . only the surface . . .*". The Committee found this wording too restrictive. Consequently, *the Committee rejected this version*, allotting "only the surface . . ." and broadened the mineral grant by inserting:

> "That the timber, coal or other minerals, including oil, gas and other natural deposits, on said reservation are hereby reserved for the benefit of the Tribe: *Provided*, That at the expiration of fifty years from the date of the approval of this Act, the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs:. . . ."[70]

[69] 67 Cong. Rec. 6522 (1926).

[70] 67 Cong. Rec. 9735 (1926).

This is the language which finally emerged as the grant of minerals in the final act.

Thus the Committee was presented with and considered a restricted mineral grant. However, the Committee rejected allotting ". . . only the surface . . ." in favor of the present language.[71]

Such deliberate rejection of the "surface only" language by the Committee is strong evidence of Congress' intent not to delay *vesting* the minerals.

In addition, the bill, as presented to the Senate Committee on Indian Affairs, required a geological survey to determine the mineral land and withhold this land from allotment.[72] However, the Committee deleted the "geological survey" section evidencing further intent to allot the minerals.

B. Neither The 1926 Allotment Act Nor The Language Of The Trust Patents Reserve Any Power In Congress To Divest The Allottees' Mineral Interest.

Petitioner's entire argument is permeated with the rather ill defined notion that Congress retains boundless authority to divest the allottees' mineral interest without compensation. The closest Petitioner comes to any actual authority for such a proposition is Sec. 1 of the Northern Cheyenne Allotment Act which provides:

> ". . . That the Northern Cheyenne Indian Reservation . . . is hereby declared to be the property of said Indians, *subject to such control and manage-*

[71] 67 Cong. Rec. 9735 (1926).

[72] 67 Cong. Rec. 6522 (1926).

ment of said property, as the Congress of the United States may direct." Act of June 3, 1926, 44 Stat. 690. (Emphasis added)

Petitioner interprets this "control and management" language as a retained power to abrogate individual property rights. However, such a construction is erroneous for several reasons.

First, interpreting the Section 1 "control and management" clause as the sweeping reservation of power necessary to terminate the allottees' interests at issue is directly contrary to the policies underlying a host of allotment acts.

The general framework of the allotment system was set forth in the General Allotment Act,[73] with separate implementing acts for each reservation. The statute at issue,[74] implemented the allotment system on the Northern Cheyenne Indian Reservation. The General Allotment Act and the various implementing acts should be construed "pari materia".[75] Consequently, the policies expressed in the General Allotment Act and the allotment system apply to the specific implementing acts, such as the statute at issue.

As was stated earlier[76] the purpose of the allotment system was to give Indians individual ownership of land. The entire allotment system was geared toward vesting rights to allotments in the allottees with a view toward the ultimate emancipation of the ward-Indians.[77] Thus,

[73]Act of February 8, 1887, 24 Stat. 388.

[74]Act of June 3, 1926, 44 Stat. 690.

[75]Arenas v. United States, 322 U.S. 419 (1943) and Tiger v. Western Investment Co., 221 U.S. 286, 306 (1911).

[76]Supra at Sec. IA.

[77]F. Cohen, *Handbook of Federal Indian Law*, 206-21 (1940).

vesting property rights in individual allottees was the central policy underlying the allotment system. Since the Northern Cheyenne allotment act was passed to implement the allotment system on the Northern Cheyenne Indian Reservation, it should be interpreted as furthering the allotment system's purpose of vesting property rights in individual allottees.

Please note that Section 1 of the 1926 act relates to the entire Reservation in the most general terms. Section 1 is not limited to minerals. Consequently, if the "control and management" language of Section 1 may be used as authority to terminate rights set forth in another part of the act, then such a broad reservation could be used to terminate *any* property rights on the Northern Cheyenne Indian Reservation. Thus, if Petitioner's construction of Section 1 were accepted, it would be impossible for any property rights on this reservation to vest in anyone! Were Petitioner's construction of Section 1 correct, we would find Congress in the curious position of beginning the text of an allotment act with a statement which destroys the very purpose of the act.

Were Petitioner's construction of Section 1 correct, one cannot imagine what schizoid design Congress could have had in mind to write an allotment act which would leave all property rights dangling perpetually at the Congressional whim. Clearly, such an interpretation of Section 1 should be rejected.

Second, the "control and management" language of Section 1 is a separate section from the section granting mineral rights. This is significant because the section which deals with mineral rights *specifically limits Congressional management* to *un*allotted lands.

> "...*Provided further*, that the *un*allotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient ..." Act of June 3, 1926, 44 Stat. 690, Sec. 3. (Emphasis added)

Third, the "control and management" language of Section 1 is part of the introductory language of the Act. When read in this context, this "control and management" phrase emerges as a general statement of policy; that Congress intends to exercise its *normal guardianship duties* on the Northern Cheyenne Indian Reservation.[78] It should not be elevated to a "juggernaut" clause, somehow reserving in Congress the power to devastate otherwise constitutionally protected rights.

Petitioner points to the language of the *trust patents* reserving minerals in the tribe as evidence of a delayed vesting in the allottees. However, the language of the trust patents does not substantiate any delayed vesting.

Initially, the language of the trust patent is not controlling. Indeed the *Choate* decision specified the allottees took all the rights conferred in the statute regardless of the language in the trust patent;

> "Those who signed the patent would not convey more rights than were granted by that part of the Curtis Act, *nor could they, by omission, deprive the patentee of any exemption to which he was thereby entitled.*" Choate v. Trapp, 224 U.S. at 673. (Emphasis added)

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[78]This becomes apparent upon viewing this language as the opening section of Congress' first substantive legislation regarding the Northern Cheyenne Indian Reservation.

Consequently, omitting reference to the allottees remainder type mineral interest in the trust patent cannot prejudice the existence of that right.

Secondly, the trust patent states:

> "NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said Indian the above-described land as a Homestead, *subject to all the provisions, conditions, limitations, and restrictions contained in said Act of June 3, 1926*, and hereby declares that it does and will hold the land so allotted in trust for the sole use and benefit of the said allottee, ..."[79] (Emphasis added)

The trust patent specifies it is subject to the terms of the 1926 Allotment Act. Therefore, the trust patent incorporates the allottee's remainder interest by reference into the terms of the trust patent.

The *third* reason the trust patent's language does not delay the vesting is, the trust patent only refers to the possessory incidents of ownership. Since the tribe had possession of the minerals through 1976, it was listed in the trust patent as the owner of the minerals. Since land held under a trust patent was not alienable, it was not necessary to specify the future interests in such land.

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[79]Appendix at A.

C. When Congress Intended To Reserve The Power To Extend Tribal Ownership Of Minerals It Included The Requisite "Unless Otherwise Provided By Congress" Proviso In The Allotment Act's Grant Of Minerals. The Unusual Absence Of This Proviso Indicates Congress' Intent To Immediately Vest The "Remainder" Interest In The Minerals In The Allottees.

If Congress desired to reserve the power to alter individual allotment rights such power must be specifically set forth in the allotment act.[80] It may not be inferred from Congress' general plenary power[81] which only controls tribal property. And it may only affect rights vesting *after* passage of the act.[82] The necessity of a specific reservation of power is illustrated by the language of other allotment acts. Numerous allotment acts including those for the Crow,[83] Fort Belknap,[84] Blackfeet,[85] Standing Rock and Cheyenne River,[86] and Osage Indian Reservations[87] specifically

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[80]*Adams v. Osage Tribe*, 59 F.2d 653 (10th Cir. 1932) approved an extension of tribal mineral ownership because Congress reserved its power to re-allocate the minerals by including the "unless provided otherwise by Congress" limitation in the allotment act's mineral grant. Consequently, the allottees to subject to this condition.

[81]Mullen v. United States, 224 U.S. 448 (1912).

[82]Raymond Bear Hill, 52 I.D. 688 (1929).

[83]Act of June 4, 1920, 41 Stat. 751.

[84]Act of March 3, 1921, 41 Stat. 1355.

[85]Act of June 30, 1919, 41 Stat. 17.

[86]Act of May 29, 1908, 35 Stat. 460.

[87]Act of June 28, 1906, 34 Stat. 539.

included such a reservation of power to alter disposition of the mineral estate by stating "... unless otherwise provided by Congress" in the allotment act's mineral grant. However, if this proviso were unnecessary (as Petitioner contends) this repeatedly used proviso would be mere surplusage. Rather the repeated use of virtually the same statutory language is a strong indication that such specific reservation of power was necessary.

This Court has repeatedly rejected claims of an implied power in Congress to subsequently alter vested allotments rights. Indeed if such implied power existed *Choate v. Trapp* would have been decided opposite its actual outcome. Also, *Woodward v. DeGraffenried*, 238 U.S. 284 (1915) held vested allotment rights immune from redistributive statutes. In *Woodward*, the allotment at issue was taken under the terms of the Curtis Act. The Curtis Act allotment was provisional until approved by the tribe. Later, the tribe approved the allotment in the Original Creek Agreement. The allottees' rights vested at this time. The Original Creek Agreement incorporated Creek intestacy laws. Prior to passage of the Supplemental Creek Agreement the allottee died and the allotment vested in her estate. The Supplemental Creek Agreement substituted Arkansas intestacy laws. The issue in *Woodward* was, which intestacy law controlled descent of the allotment? In holding Creek law controlling, this Court noted that once the heirs' right to a distributive share vested it could not be removed by subsequent Congressional enactment. Recognition of such vesting is clearly at odds with any supposed implied power in Congress to change such distributive scheme *IF* interpreted to affect rights previously vested.

Also *Arenas v. United States*, 322 U.S. 419 (1944) rejected any implied federal power to re-allocate vested allotment rights. In *Arenas* the Secretary of the Interior deemed it not in the best interest of the tribe to allot land to the Mission Indians. Consequently, the Secretary refused to honor Lee Arenas' allotment application. This Court rebuked this refusal and compelled issuance of the allotment. Again, such result does not square with the Petitioner's claimed implied federal power to re-distribute Indian property.

A rather pointed rejection of any implied power of the federal government to re-distribute allotment rights is found in *Leecy v. United States*, 190 F. 289 (8th Cir. 1911). In *Leecy* the allottee had filed an application for allotment of a particular tract. However, the Bureau of Indian Affairs and the tribe had a contract whereby the land was reserved for tribal use as a sawmill. Despite several statutes giving the Secretary of the Interior broad supervisory power over Indian lands and allotments, and despite the contract with the tribe, the Secretary did not have authority to withhold Leecy's allotment. *The reason was absence of any specific statutory authority*. Consequently, an express statutory reservation of authority is also required to re-allocate the minerals at issue.

When Congress intended to reserve the right to alter disposition of the minerals it undertook to do so. On numerous occasions Congress reserved minerals to the tribe for a period, then may transfer such minerals to the allottees. However, in such instances, Congress left its options open to extend tribal ownership. Again the allotment acts covering the Osage[88] and Standing Rock

[88]Act of June 28, 1906, 34 Stat. 539.

and Cheyenne River,[89] and most Montana reservations including the Blackfeet,[90] Fort Belknap,[91] and the Northern Cheyenne's neighboring Crow[92] Indian Reservation all provided for a delayed shifting of the minerals possession from the tribal councils to the allottees. However, ALL these allotment acts conditioned such transfer by providing "unless provided otherwise by Congress" or by equivalent proviso. Thus it had become common practice for Congress to reserve the power to extend tribal ownership of minerals long prior to enactment of the Northern Cheyenne Allotment Act (all the other allotment acts listed above were enacted *prior to* the act at issue.) As a result of the common practice of including this "unless provided otherwise. . . . " proviso, the delegation of such proviso may only be attributed to the fact that Congress did not intend for such power to exist. The rule of construction as appropriately set for in *Monson v. Simonson*, 231 U.S. 341 (1913) is;

> "And it is significant that the provision contains no words directly or presently removing the existing restrictions upon alienation, while other kindred provisions in the same act, relating to other allotments, contain the words 'and all restrictions as to sale, encumbrance, or taxation of said lands are *hereby* removed.' *It hardly can be said that the absence of those words in this instance and their presence in others is not indicative of a difference in meaning and purpose.*" (Emphasis added)

[89]Act of May 29, 1908, 35 Stat. 460.

[90]Act of June 30, 1919, 41 Stat. 17.

[91]Act of March 3, 1921, 41 Stat. 1355.

[92]Act of June 4, 1920, 41 Stat. 751.

The omission of the "unless provided otherwise by Congress . . ." proviso did carry with it a difference in meaning. The difference in meaning indicates Congress' intent not to reserve such power.

Indeed such power could not exist if, as designed by Congress, the allottees' "remainder" interest vested upon filing a proper allotment application.

D. Congress' Specifically Requiring The Tribal Council To Quiet Title In The Minerals Indicates Strong Congressional Doubt As To The Constitutionality Of The 1968 Amendment.

Petitioner terms the 1968 amendment an "exemplary" exercise of Congress' plenary powers over Indian affairs.[93] Petitioner stands alone in this belief. Apparently not even Congress thought this act "exemplary" for significantly the 1968 amendment specifically required the tribal council to bring this suit to test the validity of divesting the allottees' mineral estate. As the 1968 amendment stated:

> "Sec. 2. The Northern Cheyenne Tribe is authorized to commence in the United States District Court for the District of Montana an action against the allottees who received allotments pursuant to the Act of June 3, 1926, as amended, their heirs or devisees, either individually or as a class, *to determine whether* under the provisions of the Act of June 3, 1926, as amended, the allottees, their heirs or devisees, have *received a vested property*

[93]Petitioner's Brief at Sec. 5.

> *right in the minerals which is protected by the fifth amendment.* The United States District Court for the District of Montana shall have jurisdiction to hear and determine the action and an appeal from its judgment may be taken as provided by law. *If the court determines that the allottees, their heirs or devisees, have a vested interest in the minerals which is protected by the fifth amendment, or if the tribe does not commence an action as here authorized within two years from the date of this Act, the first section of this Act shall cease to have any force or effect,* and the provisions of section 3 of the Act of June 3, 1926, as amended by the Acts of July 24, 1947, and September 21, 1961, shall thereupon be carried out as fully as if section 3 had not been amended by this Act." Act of July 24, 1968, 82 Stat. 424. (emphasis added)

Thus, Congress provided that the 1968 amendment would be void unless vindicated by the courts. The purpose of this section is to insure that the federal government would not be liable to the allottees in an Indian Claim Commission action for the value of the minerals divested. *Congress was so deeply concerned about such liability as to mandate this lawsuit by express statutory proviso and specifically condition the tribal council's rights on winning this suit.* This indicates a *formidable Congressional apprehension*[94] that the 1968 amendment was an unconstitutional taking. Indeed, the Ninth Circuit's decision below proves this apprehension to be well-founded. The decision below specifically recognized the Congressional doubts behind this section by commenting on Section 2 as follows:

[94]The legislative history mentions the problem of divestment several times H.R.Rep.No. 1292, 90th Cong. 2nd. Sess. 4 (1968).

> *"That Congress realized it may have exceeded even its own plenary power* to deal with tribal property (United States v. Jim, et al., supra.) in enacting the amendment of July 28, 1968, here in issue *is evidenced by the unusual nature of the enactment itself. The 1968 amendment to the 1926 Allotment Act,* attempting to reserve the mineral deposits to the tribe in perpetuity, is wholly provisional, and explicitly leaves the validity of the enactment entirely up to the court." Northern Cheyenne Tribe v. Northern Cheyenne Class of Allottees, Heirs and Devisees, 505 F.2d 268, 273 (9th Cir. 1974). (Emphasis added)

Thus it has been recognized that Congress' intent being couched in such apprehension does, in itself, raise substantial doubt regarding the 1968 amendment's validity. While such doubts are not conclusive, it is important that this Court be appraised of the fact that Congress tacitly acknowledged it was probably reaching beyond its lawful powers.

III.

WHILE THE 1968 AMENDMENT OSTENSIBLY RE-ALLOCATES THE COAL TO THE TRIBAL COUNCIL, IT ACTUALLY ACCOMPLISHES A SUBSTANTIAL TAKING FOR NON-INDIAN PURPOSES. THEREFORE, THE 1968 AMENDMENT EXCEEDS CONGRESS' PLENARY POWER.

Federal re-allocation of tribal property falls into two categories.

First re-allocation in which the benefits are shifted *among* the tribal members. Cases such as *Gritts v.*

Fisher, 224 U.S. 640 and *United States v. Jim,* 409 U.S. 80 (1972) fall in this category. The validity of such re-allocations rests on the assumption that a tribal property is still being kept within the tribe. As a result the courts will not interfere with "in house" reallocation of communally owned assets.

In the *second* category Congress or federal agents reallocate tribal property by removing property from tribal ownership to benefit non-Indians. This category of re-allocation is viewed very differently from the first category. When the re-allocation removes property from the benefit of the tribe it is viewed with strict disfavor. *Lane v. Santa Rosa,* 249 U.S. 110 at 113 (1919) described such re-allocation as: "That would not be an exercise of guardianship but an act of confiscation". Such re-allocations abrogate the Indians' property rights and are compensable in damage actions.[95]

Consequently, if the 1968 amendment operates to remove part of the Northern Cheyenne mineral estate from the benefit of the tribe or tribal members, as a class, such re-allocation falls within the disfavored second category. While on its face, the 1968 amendment merely gives the minerals to the tribal council, it actually accomplishes a very substantial diversion of the consequent royalties to non-Indians use. This depletion of the mineral estate available as beneficial to the Indians is caused by 25 U.S.C. 398c which provides:

> "Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells or other rights, property, or assets of any lessee upon lands within Executive Order Indian reservations in the same

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[95]This is the theory behind Indian Claims Commission actions as authorized at 25 U.S.C. 70 as opposed to normal guardianship re-allocations.

> manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury: Provided, That such taxes shall not become a lien or charge of any kind against the land or other property of such Indians."

The Northern Cheyenne Indian Reservation is an Executive Order reservation.[96]

Thus, if the coal underlying the allotment land is mined as tribal property, it is subject to state taxes. *This is very significant in this case because Montana imposes a 30% tax on such coal!*[97] The proceeds from this tax go to the State of Montana with no obligation to use it to benefit the Northern Cheyenne people.

However "... it is not lightly to be assumed that Congress intended to tax the ward ..."[98] Thus, the allottees' interests should be particularly favored because if the coal is the property of the allottees, it is immune from such taxation according to *Squire v. Capoeman*, 351 U.S. 1 (1955).

Consequently, if the Respondent/Allottees prevail in this suit, the coal is immune from taxation hence all the royalties from the coal at issue remain under Indian control for Indian use and benefit. But if the Tribal Council wins this suit the coal will be taxable and the

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[96]Executive Order of President Chester A. Arthur on November 26, 1884, C. Kapplar *Indian Affairs: Laws and Treaties*, Vol. I at 860.

[97]84-1314 R.C.M. (1947).

[98]Squire v. Capoeman, 351 U.S. 19 (1955).

Indians will lose 30% of the royalties "off the top" before it can be used to benefit the Northern Cheyenne people. Such a depletion of the mineral estate (a loss probably in excess of one billion dollars!) for non-Indian purposes is clearly beyond Congress' plenary power. Lane v. Santa Rosa, 249 U.S. 110 (1919). Since this is the effect, as a matter of law, of the 1968 amendment's "re-allocation", the 1968 amendment should be ruled invalid.

IV.

OWNERSHIP OF TRIBAL LAND, THE TRIBAL COUNCIL'S LEGISLATIVE AUTHORITY, AND SUPERVISION OF MINERAL LEASING BY THE SECRETARY OF INTERIOR PROVIDE AMPLE MEANS OF REGULATING ANY ON-RESERVATION MINERAL DEVELOPMENT WITHOUT DIVESTING THE INTERESTS OF THE INDIAN ALLOTTEES.

A. Ownership Of Tribal Land And The Tribe's Legislative Authority Provide Tribe With Ample Means Of Regulating Any On-Reservation Mineral Development Without Divesting The Interests Of The Indian Allottees.

The tribal council implies it must maintain complete control of the mineral estate under the Northern Cheyenne Indian Reservation to adequately control any mineral development.[99] But, the issue in this case is whether the 1926 allotment act conferred a vested right

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[99]Petitioner's Brief at Sec. 5.

to the allottees. Since the tribal control of mineral development is not addressed to the 1926 Act's vesting issue, it is not technically at issue in this case. However, as the Petitioner has presented the issue to this Court, Respondent feels compelled to reply.

It is not necessary for the tribal council to maintain complete ownership of the mineral estate to adequately control mineral development on the Reservation. There are several reasons for this. The first reason, is that approximately sixty-two percent of the Northern Cheyenne Indian Reservation is already tribally owned. Consequently, the tribal council, as owner of this land, may control or restrict coal mining on the majority of the Reservation through its lease negotiations. It is only the remaining non-tribal land constituting approximately thirty-two percent of the reservation, here at issue. The tribal council may exercise comprehensive control over any mineral development on this non-tribal land through exercise of its governmental powers, *regardless of who owns the coal.*

Under the Wheeler Howard Act, Congress delegated the general governmental responsibilities over reservations to tribal councils.[100] The Northern Cheyenne Tribe was organized under the Wheeler Howard Act.

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[100]25 U.S.C. 476 authorized various Indian tribes to adopt a tribal constitution and by-laws for their own self government. Under the terms of this act the tribal council may pass tribal ordinances which become effective upon approval by the Secretary of the Interior. In effect this is a general delegation of governmental responsibility to the tribe's governing body, subject to general supervision by the Secretary of the Interior. See *Powers of Indian Tribes,* 55 I.D. 14 (1934) for the Department of Interior's interpretation of tribal powers under the Wheeler Howard Act.

Consequently the Northern Cheyenne Tribal Council may enact ordinances governing the conduct of business within the exterior boundaries of the Northern Cheyenne Indian Reservation.

Such governmental authority is broad enough to adequately regulate any coal development within the Reservation. Indeed, last term this Court re-affirmed a tribal council's authority to regulate business activity of non-Indians on the Reservation in *United States v. Mazurie,* __ U.S. __[101] 42 L.Ed.2d. 706 (Jan. 21, 1975). The *Mazurie* decision emphasized several earlier decisions of this Court giving tribal councils authority to regulate business of Indians and non-Indians alike.[102] Such tribal authority extends to both civil[103]

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[101] While the *Mazurie* case involved enforcement by federal, rather than tribal officials, the actual ordinance violated by Mazurie was tribal not federal. Just as Congress properly delegated legislative authority to the tribe in *Mazurie* at 18 U.S.C. 1161, Congress has likewise delegated the legislative authority necessary to regulate land use including coal mining to tribes such as the Northern Cheyenne at 25 U.S.C. 476. The *Mazurie* case further stands for broad tribal authority to regulate on-reservation business because it applied a tribal ordinance to activities by a non-Indian on fee patent land. See 42 L.Ed.2d. at 715.

[102] In both *Williams v. Lee*, 358 U.S. 217 (1959) and *Kennerly v. District Court,* 400 U.S. 423 (1971) this Court rebuffed attempts by non-Indians to sue in state courts on civil matters arising on Indian reservations. *Williams* and *Kennerly* both involved suits arising from commercial transactions, thus affirmed tribal authority to regulate such business activity. Since non-Indians are required to use tribal courts by the result of *Williams* and *Kennerly*, the legitimacy of such tribal jurisdiction is implicit in these decisions.

[103] *Williams v. Lee,* 358 U.S. 217 (1959) and *Kennerly v. District Court,* 400 U.S. 423 (1971) were both civil suits for collection of a debt.

and criminal law.[104] Further, such authority extends over the entire Reservation, whether the land involved is tribal,[105] trust patent or fee patent land.[106] Thus, the tribal council's governmental authority, within the Reservation, is comprehensive.

With such authority to regulate all business activity within the reservation, the tribal council may shape any on-Reservation mineral development by a variety of legislative schemes. For instance, the tribal council may set its own standards for lease provisions of non-tribal land by imposing such provisions as requisites to a tribal "business license" as was used in the *Mazurie* case. The tribal council could also impose its desired standards for mineral development through a set of zoning ordinances or land use planning ordinances. Enforcement of such provisions could be financed through a tribal tax on the regulated business

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[104] *United States v. Mazurie*, ___ U.S. ___, 42 L.Ed.2d. 706 (Jan. 21, 1975) was an appeal from a criminal conviction. Also recently the U.S. District Court for the Western District of Washington, affirmed trial court jurisdiction over an offense committed by a non-Indian on tribal property. Oliphant v. Schlie, ___ F.Supp. ___ No. 510-73C2 (W.D. Wash. April 5, 1974).

[105] 25 C.F.R. 171.29 specifically allows tribal by-laws, ordinances etc., to supercede even the federal regulations for leasing tribal lands.

[106] In the past, tribal authority arguably lapsed upon issuance of the fee patent. However, this checkerboard theory of tribal authority was rejected by *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Williams v. Lee*, 358 U.S. 217 (1959); *Kennerly v. District Court*, 400 U.S. 423 (1971) and again in *United States v. Mazurie*, ___ U.S. ___, 42 L.Ed.2d 706 (Jan. 21, 1975). Therefore, tribal authority now extends to all lands within the exterior boundaries of the reservation.

activity.[107] Clearly such legislative devices provide the tribal council with ample means of regulating or limiting any coal development on the Reservation without divesting its individual Indian constituents of their right to share in any consequent royalties.

B. The Truly Protective Scope Of Federal Supervision Of On-Reservation Mineral Leasing Specifically Hinges On Mineral Ownership In The Respondent/Allottees.

The Secretary of the Interior supervises mineral leasing on the reservation. The guidelines for this supervision are at 25 C.F.R. 171-172, 177. The sections dealing generally with mineral leasing on tribal[108] and allotted[109] land are addressed primarily to the conventional commercial aspects of such leases, i.e., disclosure of fiscal information by corporate lessees, bonding, royalty and rental payments, and the Secretary's approval of the lease. The Secretary's review of the lease provides a mechanism to assure that the Indian or tribe receives adequate royalties, bonding of the lessee, etc. In addition, all lease assignments must be approved by the Secretary of the Interior.[110] This will allow the Secretary to prevent any "land rush" by

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[107] In *Morris v. Hitchcock*, 194 U.S. 384 (1904) this Court affirmed tribal authority to tax on-Reservation business activity of non-Indians for business conducted on both trust allotments and fee patent town lots. Also see 23 Opps.Atty. Gen.528 approving a tribal excise tax on hay grown on the reservation.

[108] 25 C.F.R. 171.

[109] 25 C.F.R. 172.

[110] 25 C.F.R. 177.22(a).

only approving leases of actual operators and, disapproving leases of speculators. Consequently, any lessee will not be able to take undue advantage of the Indian party in these areas of commercial concern unless the Secretary of Interior is derelict in performing his supervisory duties.

Protection of the broader "environmental, cultural, historical and recreational" interests is set forth at 25 C.F.R. 177. Indeed, these broad interests must be taken into account under the requirements of the National Environmental Protection Act.[111] *However, 25 C.F.R. 177 limits such review in a manner crucial to the results of this case.* Review of environmental, cultural, etc., considerations is limited as follows:

> "The regulations in this part *do not cover* the exploration for oil and gas or the issuance of leases, or operations thereunder, nor minerals underlying *lands, the surface of which is not owned by the owner of the minerals.*" 25 C.F.R. 177.2 (b). (Emphasis added)

Viewing this limitation, the broader social considerations involved in strip mining only need be taken into account by the Department of the Interior if the Respondent/allottees prevail here before this court! If the tribal council prevails here, ownership of the minerals underlying the allotment lands will be severed from surface ownership. Consequently, if the Petitioner/tribal council wins here, the Department of the Interior evidently is NOT required to examine the

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[111]*Davis v. Morton,* 469 F.2d 593 (10th Cir. 1972) held the Secretary of the Interior's approving a lease for real estate development on tribal land was "major federal action" triggering the environmental review requirements of N.E.P.A., 42 U.S.C. 4321 et seq.

cultural, historical, environmental, etc.[112] considerations crucial to preserving the viability of the Northern Cheyenne Indian Reservation as a homeland. As a result, this vast and incredibly technical burden will be

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[112]Among the considerations that must be taken into account are: "The technical examination shall take into consideration the need for the preservation and protection of other resources, including cultural, recreational, scenic, historic, and ecological values; and control of erosion, flooding, and pollution of water; the isolation of toxic materials; the prevention of air pollution; the reclamation by revegetation replacement of soil, or by other means, of lands affected by the exploration or mining operations; the prevention of slides; the protection of fish and wildlife and their habitat; and the prevention of hazards to public health and safety." 25 C.F.R. 177.4(a)(1).

Mining activity may be curtailed if: "The superintendent may prohibit or otherwise restrict operations on any part of an area whenever it is determined that such part of the area described in an application for a permit or lease is such that previous experience under similar conditions has shown that operations cannot feasibly be conducted by any known methods or measures to avoid–(1) Rock or landslides which would be a hazard to human lives or endanger or destroy private or public property; or (2) Substantial deposition of sediment and silt into streams, lakes, reservoirs; or (3) A lowering of water quality below standards established by the appropriate State water pollution control agency, or by the Secretary of the Interior, or his authorized representative; or (4) Lowering of the quality of waters whose quality exceeds that required by the established standards–unless and until it has been affirmatively demonstrated to the Secretary of the Interior, or his authorized representative, that such lowering of quality is necessary to economic and social development and will not preclude any assigned uses made of such waters; or (5) The destruction of key wildlife habitat or important scenic, historical, or other natural or cultural features." 25 C.F.R. 177.4(d).

thrust on the nominal resources of the Northern Cheyenne Tribe.

However, if the Respondent/allottees win here, the mineral and surface estates of allotment lands remain intact, triggering the broad "environmental, cultural, historical, etc.[113] assessment prior to any mining activity.

V.

PETITIONER'S AUTHORITY DOES NOT SUPPORT ITS THESIS OF UNBRIDLED CONGRESSIONAL POWER OVER INDIVIDUAL INDIAN PROPERTY RIGHTS.

Petitioner cites numerous cases in its claim that Congress retains plenary power to re-allocate Indian property though such power is not expressly reserved. Here Petitioner paints the issues involved with a very broad brush so as to misconstrue the authorities cited and blur the distinction between individual and tribal property. However, upon examining this authority, it becomes apparent the cases cited lie on the periphery of the vesting process, but do NOT support any Congressional authority to re-allocate property once it has vested in the individual Indian. Since the rights at issue have vested, Petitioner's authority does not bear upon the rights before the Court.

The authorities cited fall into several categories which clearly do not apply to the rights at stake in this case. Such authorities may be categorized as follows:

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[113]See n. 112.

A. Tribal Property

The following cases only allow re-allocation of *tribal* property, *not individually owned property:*

United States v. Jim, 409 U.S. 80 (1972)

Chippewa Indians v. United States, 307 U.S. 1 (1938)

British-American Oil v. Board of Equalization, 299 U.S. 159 (1937)[114]

Chase Jr. v. United States, 256 U.S. 1 (1921)[115]

Nadeau v. Union Pacific Railroad, 253 U.S. 442 (1920)[116]

United States v. Chase, 245 U.S. 89 (1917)[117]

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[114]In *British-American* the tribe owned the mineral estate underlying alloted surface. This case allowed taxation of the minerals as tribal property. This case did not involve claims of any individual allottees nor did it prejudice any individual property rights.

[115]In *Chase Jr.*, a statute terminated allotment *before* Mr. Chase had selected his allotment. This court held that no individual rights had vested (since individual rights don't vest in an allotment until the application is properly filed) so the land remained tribal and could be re-allocated.

[116]In *Nadeau* the statute giving the railroad a right of way on the reservation was passed *prior to* selection of the land at issue for an allotment. Since individual claims do not attach until after selection by the allottee, the land was still tribal when allocated to the railroad.

[117]The *Chase* case involved a dispute over a tract of land between one who claimed under a right of occupancy through a treaty, and one who claimed the land through a later allotment statute. The rights under the allotment act prevailed. Prior to the allotment, the land retained its tribal character and no rights could vest therein. While recognizing Congress' power to re-allocate such *tribal* property, the *Chase* decision also acknowledged the rights later vested in the allottee.

Sizemore v. Brady, 235 U.S. 441 (1914)

Gritts v. Fisher, 224 U.S. 640 (1912)

Gritts v. Fisher is the lead case. The *Gritts* decision, accompanied by the *Choate* decision, only held that Congress may re-allocate *tribal* property.[118] However, the *Gritts* decision repeatedly stated its holding did not apply to individually owned allotments[119] for the status of individually owned property was thoroughly discussed in *Choate v. Trapp.* The *Gritts* and *Choate* decisions are discussed at length at Sec. I.B.1.

The Petitioner also relies extensively on *United States v. Jim, supra.*, as supporting Congress' supposedly unbridled power over Indian property. The *Jim* case involved a statute requiring oil and gas royalties be spent to benefit the inhabitants of the "Aneth Extension",[120] a portion of the Navajo Reservation. A later statute enlarged this class to beneficiaries to include all "Navajo Indians residing in San Juan County."[121] While allowing this expanded class of

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[118]The property at issue was a fund created by selling unallotted tribal land to homesteaders. Since the property sold to create the fund was tribal, the fund retained its character as "tribal property" until it was actually distributed. Cohen, *Handbook of Federal Indian Law* 184 n.8 (1941).

[119]The *Gritts* decision noted: "It is *not proposed to disturb the individual allotments* made to members. . . . It is conceded, and properly so, that the later legislation is valid and controlling unless it impairs or destroys rights which the act of 1902 vested in members living September 1, 1902 and enrolled under the act. *As has been indicated, their individual allotments are not affected.*" 224 U.S. at 640, 647-48 (Emphasis added).

[120]Referred to in Petitioner's Brief as "Anteh" extension. Petitioner's Brief at Sec. 2.

[121]Act of May 17, 1968, 82 Stat. 121.

beneficiaries, this Court emphasized the royalties at issue were tribal property by noting,

> "Congress in 1933 did not create constitutionally protected property rights in the appellees. The Aneth Extension was added to a tribal reservation, and *the leases which give rise to mineral royalties are tribal leases.* It is settled that "*[w]hatever title the Indians have is in the tribe*, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members." United States v. Jim, 409 U.S. at 82. (Emphasis added).

As the leases were "tribal leases" they fall under the rule set forth in *Gritts v. Fisher.* Accordingly, the *Jim* decision relied on *Gritts v. Fisher* as authority to re-allocate such "tribal leases". However, the instant case involves rights of individual Indians in allotment land not tribal property, so the *Jim* case is inapplicable to the rights at issue.

Petitioner also quotes extensively from *Sizemore v. Brady*, 235 U.S. 441 (1914) to gain support for their notion of Congress' unlimited plenary power. However, the holding in *Sizemore* actually affirms the vesting of individual rights in an allotment once the application is filed.

In *Sizemore*, Grayson, a Creek Indian, died *before selecting an allotment.* Under the Creek intestacy laws the maternal heirs were favored. However, Congress later amended the intestacy laws in the Supplemental Creek Agreement to favor paternal relatives. After this amended intestacy law took effect, an allotment was selected on Grayson's behalf for his estate. The *Sizemore* case was a dispute between the maternal and paternal heirs to determine which intestacy law controlled disposition of the allotment.

The maternal heirs raised the constitutional claim by arguing the allotment act *per se* gave the allottee vested rights "*in praesenti*" without the allottee's application. Following this theory Grayson would have then received an interest in the allotment which would pass to his maternal heirs upon his death according to the pre-amendment intestacy law. Under the maternal heirs' "theory" the intestacy amendment was an un-constitutional attempt to divest them of an interest in the estate.

However, the constitutional question raised by the maternal heirs only arises if the allotment entered Grayson's estate prior to the intestacy law's amendment. This is because the intestacy law in force when the allotment entered the estate would determine its descent. Therefore, the issue was basically; "When did the allotment enter Grayson's estate?"

In deciding this question, this Court reasoned:

> "We have seen the allotment in question was not selected or made until after the supplemental agreement went into effect. The heirs designated in Chapter 49 of Mansfield's Digest were therefore the true beneficiaries." 235 U.S. at 451.

So the decision in *Sizemore* simply held the allotment did not enter Grayson's estate until it was selected and the application filed. Accord, see *Woodward v. DeGraffenried*, 238 U.S. 284 (1915).[122] Since the allotment was not chosen until after the intestacy

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[122]*Woodward* interpreted the same statutes as *Sizemore* consistently with *Sizemore*. In *Woodward*, the allotment vested prior to the intestacy law's amendment so the Creek intestacy laws controlled. *Woodward* specifically reconciled *Sizemore*.

laws were amended, Grayson's estate acquired no rights which could pass to his maternal heirs.

When the intestacy laws were amended, no rights had vested in the allotment so it was then tribal property which could be re-allocated by amending the intestacy laws. Sizemore did not, as Petitioner contends, allow Congress to abrogate any vested rights of the heirs by subsequent legislation.

The Petitioner also notes that *Chippewa Indians v. United States*, 307 U.S. 1 (1938) is strongly analogous to the case at hand. While the interests involved in both cases are similar, the results of the *Chippewa* case are not applicable to the instant suit. This is because the *Chippewa* case only allowed re-allocation of tribal property (during the term of tribal ownership) but did not affect the right of the individual Indians to possession upon the ultimate distribution of the res.

In both *Chippewa* and the instant suit, the property was tribal for a term of fifty years, then transferred to the individual Indians. In *Chippewa* the government evidently made unauthorized expenditures from the trust fund during the tribal ownership. The *Chippewa* decision simply held the government could re-allocate expenditures from the fund *as tribal property during the term of tribal ownership. However,* this *Chippewa* decision *only dealt with the power to administer the fund while it was tribal.* It did not interfere with the individual Indian remaindermen's right to ultimately receive the property when it was distributed.

Analogizing this to the *instant case*, admittedly the tribe may lease and exploit the minerals during its estate for fifty years. This would deplete the mineral estate ultimately taken by the allottees just as the government's expenditures depleted the amount of the

fund ultimately taken by the Chippewas. Thus, in both situations, the government may re-allocate use of the property during the tribal ownership.

However this control is limited to the period of tribal ownership. Once the period of tribal ownership ceases the government cannot alter the right of the individual Indians to receive such property. See *Arenas v. United States*, 322 U.S. 419 (1944); *Sizemore v. Brady*, 235 U.S. 441 (1941); *Hy-Yu-Tse-Mil-Kin v. Smith*, 194 U.S. 401 (1904); *Leecy v. United States*, 190 Fed. 289 (8th Cir. 1911); *Allotment Selections on The Fort Belknap Reservation*, 55 I.D. 295 (1835); and *Raymond Bear Hill*, 52 I.D. 688 (1929). Since the *Chippewa* case only presents an analogy of the rights *during* the tribe's fifty year term, it is not analogous to the actual rights at issue, thus, it doesn't address the right of the individuals to ultimately receive the property. It does not undermine the allottees right to ultimately possess the mineral estate here at issue.

B. Personal Status

Most other cases cited deal with the *personal status* of the parties, not their property rights per se. (i.e., personal rights and privileges such as citizenship and treaty rights peculiar to Indian persons, or limitations on personal rights such as wardship).

This category may be divided as follows:

(1) *Personal* characteristics (or status) which are *pre-requisites to allotment eligibility*. The following cases fit this category:

LaRoque v. United States, 239 U.S. 62 (1915)[123]

Lowe v. Fisher, 223 U.S. 95 (1912)[124]

Wallace v. Adams, 204 U.S. 415 (1907)[125]

Stephens v. Cherokee Nation, 174 U.S. 445 (1899)[126]

Since the issues in these cases involve *pre*-requisites for allotment eligibility, they address either the allotment process *prior to* any vesting of individual rights, or the Courts' power to re-examine allotment eligibility. Consequently, any principles set forth in these cases have no bearing on the instant case.

(2) Other conditions deal with the Indian's *personal* status as a *ward* of the government. These cases are:

United States v. Jackson, 280 U.S. 183 (1930)

Brader v. James, 246 U.S. 88 (1918)

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[123]In *LaRoque* the Indian died prior selecting an allotment. This decision held that tribal membership terminated upon death. Since tribal membership was also an allotment eligibility pre-requisite, such eligibility terminated upon the Indians' death.

[124]In *Lowe* this Court held the Secretary of Interior could check the tribal enrollment list and exclude persons erroneously enrolled. This decision held that if such personal status were revoked, tribal benefits hinging on this *pre-requisite* could be denied. However, neither *Lowe*, *Wallace* nor *Adams* involved allotment rights.

[125]Both *Wallace v. Adams* and *Stephens v. Cherokee Nation* involve the same basic issue as *Lowe* but the tribal enrollment is cast in terms of citizenship. All these cases reach the same result. (See n. 73).

[126]See n. 124 and 125.

Williams v. Johnson, 239 U.S. 414 (1915)[127]

United States v. Bartlett, 235 U.S. 72 (1914)[128]

Heckman v. United States, 224 U.S. 413 (1912)

Goat v. United States, 224 U.S. 458 (1912)

Tiger v. Western Investment Co., 221 U.S. 286 (1911)

Most cases in this category involve the question of whether Congress can extend the statutory period restraining alienation of trust allotments. These cases are *Tiger v. Western Investment Co., Goat v. United States, Heckman v. United States, Brader v. James,* and *United States v. Jackson.* However, these cases do not involve property rights. Rather, the restraint on alienation is a personal attribute of wardship.

Tiger v. Western Investment Co., is the lead case. In *Tiger*, this Court specifically held that the restraint on alienation was an attribute of the Indian's wardship. Thus, it related to the Indian's personal status as a ward, but was not a property right. Moreover, this Court in *Choate v. Trapp,* expressly noted this distinction and reconciled the results of *Choate* and *Tiger.*

The *Choate* decision stated:

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[127]In *Williams v. Johnson,* the question was the converse of the *Tiger* case. The issue was whether Congress could end the restraint on alienation prior to the original statutory period. This Court held such early termination was legal, again using the *Tiger* rationale that the restraint on alienation was a personal attribute of wardship, not a property right.

[128]*United States v. Bartlett,* held that extending restraints on alienation would not be applied to prejudice the rights of third parties in land held under a fee patent (freed from the restraint on alienation) when the conveyance was prior to the passage of the act extending the restraint on alienation.

> "Nothing that was said in *Tiger v. Western Investment Co.*, . . . is opposed to the same conclusion here. *For that case did not involve property rights,* but related solely to the power of Congress to extend the period of the Indian's disability. The statute did not attempt to take his land or any right, member, appurtenance thereto belonging. It left that as it was." Choate v. Trapp, 224 U.S. 665, 676 (1912). (Emphasis added)

Also the *Choate* decision was quick to add that wardship provided no basis for abrogating property rights.

> "But there was *no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property* which had been vested in the individual Indian by prior laws or contracts. Such rights are protected from repeal by the Fifth Amendment." Id. at 678. (Emphasis added)

Choate, also distinguished the restraint on alienation due to wardship at issue in *Tiger* from the tax exemption/property right as follows:

> "But the *exemption and non-alienability were two separate and distinct subjects.* One conferred a right and the other imposed a limitation. . . . The right to *remove the restriction* was in pursuance of the power under which Congress could *legislate as to the status of the ward and lengthen or shorten the period of disability.* But the provision that the land should be *non-taxable was a property right,* which Congress undoubtedly had the power to grant. That right *fully vested* in the Indians and was binding upon Oklahoma." Choate v. Trapp, 224 U.S. at 667. (Emphasis added)

Thus, the *Choate* decision decidedly spelled out that the restraint on alienation and a property right are

totally different. The restraint on alienation is a personal limitation based on wardship status while the property right is a personal right which may not be diminished due to wardship.

Goat, Heckman, Brader and *Jackson* basically reaffirmed *Tiger.*[129]

Since these cases do not involve property rights they do not support any power in Congress to abrogate individual Indians' rights in their individual property.

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[129]In *Heckman v. United States,* the restraint on alienation was extended prior to the expiration of the restraint, so there was no lapse in the lands' restricted status. Here the court summarily disposed of the alienation issue, expressly relying on *Tiger,* 224 U.S. at 428.

Similarly *Goat v. United States,* affirmed a restraint on alienation for allotments issued to Seminole freedman (ex-slaves who were affiliated with the Seminole Tribe). Again, this decision specified the restraint was not a property right: "The *inalienability* of the allotted lands was *not due to the quality of the interest of the allottee* but to the express restriction imposed." 224 U.S. at 470 (Emphasis added).

Brader v. James, extended the *Tiger* rationale allowing reimposition of the restraint on alienation to apply to land which was unrestricted at the time of the restriction's reimposition. However, since the sale at issue took place after the restraint's re-imposition the purchaser took subject to its requisites.

Later, *United States v. Jackson,* also upheld extending the restraint on alienation, again expressly relying on the rationale of the prior decisions: "That this is within the constitutional power of Congress must be considered as *concluded by our decisions in Marchie Tiger v. Western Invest. Co.... Heckman v. United States....* and *Brader v. James....*" 280 U.S. at 191. (Emphasis added).

C. The "In Praesenti" Grant Problem

Both the Petitioner and the Department of the Interior[130] attach particular importance to the language in *United States v. Rowell,* 243 U.S. 464 (1917) regarding the "in praesenti" grant. This is basically a claim that the statute, without more, is not a conveyance. Rather, further action must be taken for the statute's offer to ripen into a grant, vesting consequent rights.

Initially, as set forth fully elsewhere,[131] the *Rowell* decision, in addressing the issue of a fraud ridden allotment application by a non-Indian, is hardly applicable to the rights at issue. However, *assuming arguendo,* that the "in praesenti" grant argument is applicable, such argument does not defeat the allottee's rights at issue.

The "in praesenti" grant discussion in both *United States v. Rowell,* and *Levey v. Stockslager,* 129 U.S. 470 (1889) at most stand only for the proposition that the statute, taken alone, does not operate as a grant immediately conferring rights on the intended beneficiaries. However, the question remains—what must the intended beneficiary do to ripen this statutory offer into a vested right?

Both the *Levy* and *Rowell* cases involved private bills with issuing procedures peculiar to such private laws.

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[130]Memorandum For The United States at 12.

[131]Any discussion of the "in praesenti" grant problem in *Rowell* is unnecessary dicta because the government could set aside an allotment issued due to mistake or fraud even though a patent had been issued. The *Rowell* case is distinguished at length, infra at V.E.

Consequently, these cases are no help in determining what the applicant must do to render the grant "in praesenti". However, *Sizemore v. Brady*, 235 U.S. 441 (1914) disposes of the "in praesenti" grant problem in the context of the general Indian allotment process. In *Sizemore*, the appellants claimed the Creek allotment act was an "in praesenti" grant.[132] In rejecting this argument, this Court specifically detailed the steps necessary to ripen a statutory offer into vested rights. In rejecting the "in praesenti" statutory grant language this Court stated:

> "On the part of the maternal cousins it is contended that the provisions in the original agreement relating to the allotment and distribution of the tribal lands and funds were in the nature a grant 'in praesenti', and invested every living member of the tribe and the heirs, designated in the tribal laws, of every member who had died after April 1, 1899, with an absolute right to an allotment of lands and a distributive share of the funds, and that Congress could not recall or impair this right without violating the due

[132] *Sizemore v. Brady*, involved a dispute between two heirs of Grayson, a Creek Indian who died before applying for his allotment. Under the intestacy laws in force at the time of Grayson's death, the maternal heirs would inherit. However, before the allotment was chosen on behalf of Grayson's estate, the interstacy laws were amended to favor the paternal heirs. The issue was: Did Grayson's (or his estate's) right in the allotment vest prior to or after the amendment of the intestacy laws? In effort to establish Grayson's rights in the allotment prior to the intestacy laws' amendment, it was necessary for the maternal heirs to claim that the statutory grant *per se* conferred rights in the tribal members "in praesenti", before selection of an allotment.

> process of law clause of the 5th Amendment to the Constitution. To this we cannot assent. There was nothing in the agreement indicative of a purpose to make a grant 'in praesenti'. *On the contrary, it contemplated that various preliminary acts were to precede any investiture of individual rights.*" *Sizemore v. Brady*, 235 U.S. at 449. (Emphasis added)

Thus the statutory rights vest upon a completion of the requisite "preliminary acts".

The decision then specified that the "preliminary acts" were completed upon selecting and applying for the allotment.[133]

> "We have seen that the allotment in question was not *selected or made until* after the supplemental agreement went into effect. The heirs designated in chapter 49 of Mansfield's Digest were therefore the true beneficiaries." Id. at 451. (Emphasis added)

Thus the allotment act ripens into an "in praesenti" grant when the allotment is "selected or made" (selected and applied for) with the consequent vesting of the applicant's rights.

Finally this decision emphasized that once the rights vest, they become immune from Congress' plenary power.

> "The lands and funds to which it related were tribal property, and *only as it was carried into*

[133] While the quote does not expressly state the allottee's rights vest upon the application being "selected or made" such vesting is required by the result of the decision. Again, the issue was: When did Grayson (or his estate) acquire a vested interest in the allotment? This Court, concluded the allotment entered the estate when "selected or made" so Grayson's interest in the allotment vested when the allotment was selected and applied for on behalf of his estate.

effect were individual claims to be fastened upon them. Unless and *until that was done* Congress possessed plenary power to deal with them as tribal property.... In short, the power of Congress was not exhausted or restrained by the adoption of the original agreement, but remained the same thereafter as before, *save that rights created by carrying the agreement into effect could not be divested or impaired.*" Id. at 449-50. (Emphasis added)

As this discussion in *Sizemore v. Brady*, refers to rights of an Indian under a general, tribal allotment system, it is dispositive of any "in praesenti" grant problems posed by the instant case. *Sizemore* concludes that the statute's grant becomes "in praesenti" with the consequent vesting of rights in the allottee upon selection of the land and filing the application. This conclusion is consistent with the explanation of allotment rights presented throughout this brief.[134] Since the Northern Cheyenne allottees all applied for their allotments during the early 1930's the grant of the minerals at issue became "in praesenti" with the Respondent's rights vesting at that time.

D. The "In Lieu" Exchange Of Public Lands Problem

Curiously, in attempting to document its supposed "contract" theory of allotment rights, Petitioner strays into a discussion of the "in lieu" exchange of public lands.[135]

[134]See particularly supra at I.A., & I.C.

[135]Petitioner's Brief at 3.d.

However, the "in lieu" land exchanges cited in this discussion are based on statutory authority,[136] not on

[136]The authority for the "in lieu" exchange involved in *Wyoming v. United States*, 255 U.S. 489 (1920) is the Act of February 28, 1891, 26 Stat. 796 as cited at 255 U.S. at 493 which provides: "....and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, *in lieu* of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands *in lieu* thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township, being fractional, or from any natural cause whatever.' And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each said township, in lieu of sections sixteen and thirty-six therein; but said selections may not be made within the boundaries of said reservations....". (Emphasis added).

The authority for the "in lieu" exchange involved in *Payne v. New Mexico*, 255 U.S. 367 (1920) is also the Act of February

contractual agreement. While the quote cited by Petitioner[137] appears descriptive of a contractual agreement, when read in its context this quote merely states that the non-federal party must apply for the exchange in order for the provisions of the "in lieu" exchange statute to become applicable. Since the authority for these exchanges is statutory rather than contractual, it does not support Petitioner's effort to distinguish *Choate v. Trapp*, by its supposed "contract theory" of public land law. Quite, the contrary, the principle which emerges from both the allotment cases

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28, 1891, 26 Stat. 796, as cited at 255 U.S. at 369 which is quoted above.

The authority for the "in lieu" exchange involved in *Payne v. Central Pacific Ry. Co.*, 255 U.S. 489 (1920) is the Act of July 25, 1866, 14 Stat. 239 as cited at 255 U.S. 232 which provides: ".... there be and hereby is, granted, ... every alternate section of public land, not mineral, designated by odd numbers ... when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies *in lieu* thereof, under the direction of the Secretary of the Interior, in alternate section designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections." (Emphasis added).

These above quoted statutes, rather than any contractual agreement are the authority for the exchanges in each case.

[137]The quote here referred to is in Petitioner's Brief at Sec. 3.d. While the quote is designed to leave the impression of a contractual setting, the Petitioner actually concedes the rights involved are statutory in the preceding paragraph.

and the "in lieu" cases[138] cited is, that in land transfers in which the federal government is grantor–both on reservations and on public lands–the rights of the applicant vest upon filing a sufficient application. Indeed, these "in lieu" exchange cases lend broad support to the allottees' position, for these cases establish that the federal government, as grantor, acknowledges vested rights in applicants for land, be the applicant an Indian allottee, a non-Indian or a State.

This proposition is fully in accord with the explanation of the allotment system as set forth in this brief and further compels recognition of the Respondent/allottees' vested allotment rights.

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[138]In *Wyoming v. United States*, 255 U.S. 489 (1920) land normally appropriated to Wyoming for school purposes was reserved in a natural forest. Consequently, Wyoming filed for its "in lieu" selection. While this application was being processed the "in lieu" land was designated as mineral land. *Despite specific statutory authority permitting withholding mineral land from appropriation*, this Court compelled issuance of the patent noting Wyoming's rights vested upon filing its "in lieu" application.

The facts of *Payne v. New Mexico*, 255 U.S. 367 (1920) parallel the *Wyoming* case. Again this Court denied the Secretary of the Interior's discretion in approving the "in lieu" patent based upon the applicant's rights vesting.

In *Payne v. Central Pacific Fy. Co.*, 255 U.S. 489 (1920) Central Pacific selected "in lieu" lands to replace its normal appropriation from the public domain which was already allocated. Upon filing a proper application the Court again required issuance of the patent over the Secretary of the Interior's objection.

See also *Benson Min.&Smelting Co. v. Alta Min.&Smelting Co.*, 145 U.S. 428 (1892) see also supra. at I.C. which discusses similar cases dealing with Indian allotments.

E. Petitioner's Other Major Authority

Petitioner's claim that *Sweet v. Schock*, 254 U.S. 192 (1917), undermines the decision below is in error. The issue in the *Sweet* case was whether an allotment's tax exemption runs with the land or requires continuing Indian ownership. This case held that when an allotment is *sold to a non-Indian*, the tax exemption ceases. The rationale was that the statute dissolving the tax exemption upon alienation of the land to a non-Indian was passed *prior to* the land sale at issue. Consequently, the purchaser took subject to the statute's terms. This case did not divest any Indian's rights to a tax exemption as Petitioner would have us believe.

Both Petitioner and the Department of the Interior[139] rely heavily on *United States v. Rowell*, 243 U.S. 464 (1917) as a supposed cornerstone for construing allotment acts. This reliance merits examination. Upon such examination the *Rowell* case is neither susceptible to broad application nor applicable to the instant case for the following reasons:

1.–The *Rowell* decision was a response to the procurement of an allotment by Mr. Rowell's *fraud*, hence any language of statutory construction is both dicta and inapplicable to the instant case.

2.–Assuming *Arguendo*, that the vesting issue in *Rowell* has any vitality, application of such rationale to the instant case has been rejected by other decisions of this Court and overruled by later decisions of this Court.

3.–Mr. Rowell was not an Indian. Therefore, the set of policies and consequent rules of statutory construc-

[139]Memorandum For The United States at 12.

tion governing tribal allotment acts are inapplicable to Mr. Rowell's "allotment".

4.–The land involved was not reservation land. Therefore, rules applicable to disposition of "public lands" govern Mr. Rowell's "allotment" rights.

First, the language in the *Rowell* decision is the exception to the rule in construing allotment acts because of its unique fraud-ridden fact setting. Mr. Rowell, a non-Indian residing on the Kiowa Reservation, procured a private bill authorizing the Secretary to issue him an allotment. However, the patent was withheld pending further investigation of Mr. Rowell's application. The resulting Congressional investigation disclosed that Rowell had perpetrated a fraud on Congress in securing this legislation. Indeed Congress, in repealing Mr. Rowell's private allotment act repeatedly characterized Rowell's methods of procuring his allotment as *"fraud"*, *"deliberate misrepresentation"*[140] and

[140]"Mr. Cullop. Mr. Chairman, as I understand it, it is admitted here that this *was procured by fraud.*" 46 Cong. Rec. 155 (1910). (Emphasis added). Also, "Mr. Cooper of Wisconsin. . . . "Three hundred and twenty acres adjoining the land thus given him had been sold for $281,000. And yet we were led into passing the bill, which became a law, giving this Connecticut Yankee 100 acres of land that was *not Indian land at all*, and which he knew was not Indian land when he came here through his friends and *deliberately misled the honorable chairman of the Committee on Indian Affairs*, whose word on this floor I believe. He and his fellow members report unanimously that a *fraud* was perpetrated upon the committee and upon the House. . . . So far as I am concerned, I rely upon the statement of the chairman and of the other members of the committee that a *fraud* was practiced upon them and upon us, and that *the beneficiary must have known it was a fraud.* And any consumptive who could go down there in 1892 and marry and beget four children as expeditiously as he did is not entitled to delay." 46 Cong. Rec. 156 (1910).

"perpetrating this outrage"[141] Mr. Rowell's attorneys even admitted this misrepresentation in their mandamus suit to compel issuance of the patent.[142] The fraud referred to was Mr. Rowell's misrepresenting the value of the land to Congress in procuring passage of his bill. Though Rowell claimed his land was only of average value ($3,000 per allotment) it was actually worth $100,000.00.[143] Additionally, Rowell's family already

[141]"Mr. BURKE of South Dakota. I will say to the gentlemen that my purpose in introducing this bill, that any man who would be a party to what has transpired, leading to the second act of Congress in *perpetrating this outrage*, ought to be punished at least to the extent of having repeated the legislation that enrolled him, which was put upon an Indian appropriation bill and had no consideration by any committee." 46 Cong. Rec. 152 (1910). (Emphasis added).

[142]"Mr. BURKE of Pennsylvania. If the gentlemen will allow me upon what is the demurrer made—upon the nonexistence of law or the absence of authority to make the transfer? .... Mr. BURKE of South Dakota. I will give it to the gentleman so it may go into the Record.... After the title of the case the petitioner in fact, James F. Rowell, says that the answer of the defendant, Richard A. Ballinger, Secretary of the Interior, filed is bad in substance; and the demurrer is signed by Hamilton, Colbert, Yerkes, and Hamilton, attorneys for the petitioner.... Then, among other matters of law to be argued in support of the demurrer is set out the following: That under the law controlling: .... (c) *Any act or word of concealment or misrepresentation even if made to Congress by petitioner can not be set up or relied upon as a defense in this proceeding.*" 46 Cong. Rec. 151 (1910). (Emphasis added).

[143]The $100,000. is based upon the statement of Rep. Burke of South Dakota at 46 Cong. Rec. 150 (1910) and the average value of $3,500 per Kiowa allotment is also a statement of Mr. Burke's at 46 Cong. Rec. 151 (1910). Mr. Burke was the chairman of the Indian Committee which held the hearings on Mr. Rowell's endeavor.

owned 480 acres of Kiowa allotment land.[144] In deciding the *Rowell* decision, this Court specifically relied on these Congressional findings, noting ".... misrepresentation and deception were practiced by Rowell in securing the legislation." 243 U.S. at 467.

Noting Rowell's fraud is essential to properly interpreting this case. Initially such fraud relegates any "vesting" or "in praesenti" language to unnecessary dicta. This is because the government could have set Rowell's allotment aside (even after vesting) if such allotment was procured by fraud or mistake.[145] Consequently, the vesting issue in *Rowell* is wholly irrelevant to the outcome of the case.

Second, assuming the "vesting" discussion as presented in *Rowell* was proper, *Rowell's* result is a narrow exception to the vesting process. Such exception is not applicable to general allotment acts. As discussed elsewhere[146] rights in an allotment vest upon selection of the allotment and filing a proper application. This was set forth in *Sizemore v. Brady*, 235 U.S. 441 (1914) which held that an allotment entered the Indian's estate when it was selected and the application was filed.[147]

Indeed *Sizemore* expressed a rule approved in several prior decisions acknowledging rights in the allottee prior

[144]Statement of Mr. Burke at 46 Cong. Rec. 149 (1910).

[145]*United States v. Southern Pacific Co.*, 251 U.S. 1 (1919) and *Exploration Co. v. United States*, 247 U.S. 435 (1918). Washington Securities Co. v. United States, 234 U.S. 76 (1914); McCaskill Co. v. United States, 216 U.S. 504 (___) and United States v. Minor, 114 U.S. 233 (1885).

[146]Supra at Sec. I.C.

[147]For an explanation see supra at Sec. V.A.

to issuance of the patent. These decisions include: *Mullen v. United States*, 224 U.S. 448 (1912); *Hy-Yu-Tse-Mil-Kin v. Smith*, 194 U.S. 401 (1904); *Elwood v. Flannigan*, 14 Otto 562 (1882); *Crews v. Burcham*, 1 Black 352 (1862); *Doe v. Wilson*, 23 How. 457 (1859); *Leecy v. United States*, 190 F. 289 (8th Cir. 1911); and *Pka-O-Wah-Ash-Kum v. Sorin*, 8 F. 740 (C.C.N.D. Ill. 1881).

Thus, *Rowell* was issued as the exception to a well established rule of this Court.

Also, while *Rowell* was decided after *Sizemore*, it has not been interpreted as overruling *Sizemore*, etc. Indeed, this Court re-affirmed the *Sizemore's* analysis of when allotment rights vest in *Arenas v. United States*, 322 U.S. 419 (1944). In *Arenas* this Court compelled recognition of the applicant's interest in an allotment by requiring issuance of the trust patent over the Secretary of the Interior's objection. By so ruling the *Arenas* decision overruled any broad application of *Rowell* as applied to tribal allotment acts.

Interestingly the *Sizemore-Arenas* rationale of vesting was adopted by the Department of Interior in administering the allotment system.[148] See *Rights of Indians to Allotments In San Juan County*, 57 I.D. 547 (1942); *Allotment System Of The Fort Belknap Indian*

[148]While in the instant case the Department of Interior submits *Rowell* is controlling, such was not the policy "contemporaneous" with administering the allotment system. Viewing this about face on Interior's part, it appears the Department has lost the cutting edge of its administrative expertise since the allotment system was abandoned twenty-six years ago. Perhaps this is the reason for the "contemporaneous" requirement of the "contemporaneous administrative interpretation" rule.

Reservation, 55 I.D. 295 (1935) and *Raymond Bear Hill*, 52 I.D. 688 (1929). Thus the contemporaneous administrative interpretation during the allotment period acknowledged the *Sizemore-Arenas* rationale rather than that of *Rowell*. This contemporaneous administrative interpretation rejecting *Rowell's* as precedent should not be rejected without "cogent and persuasive reasons" *United States v. Jackson*, 280 U.S. 183, 193 (1930). LaRoque v. United States, 239 U.S. 62 (1915). Certainly, the instant case presents no such reason.

Also, at most, *Rowell* only means that rights don't vest until the patent has been issued. As applied to allotment systems this means the trust patent.[149] Since the trust patents at issue were issued during the 1930's even the broadest possible construction of *Rowell* does not defeat the rights here at issue.[150]

Third, Mr. Rowell was not an Indian.[151] This is important because a very different set of policies, hence different maxims of statutory construction apply in construing Rowell's position. Applications of Indian allottees, as wards of the federal government, are viewed with relative favor. Statutes shall "never be

[149]The Department of Interior decision cited herein all acknowledged rights vested under trust allotment rather than upon issuance of the fee patent.

[150]See supra at Sec. I.C.

[151]That Rowell is not an Indian is mentioned several times throughout the legislative history of the act repealing his allotment. 46 Cong. Rec. 149-51 (1910). While the original act giving Rowell the land also authorized the Kiowa Tribe to adopt Rowell, there was no evidence of such adoption, 46 Cong. Rec. 148 (1910) and the act repealing Rowell's allotment also repealed any possibility of his adoption by the Kiowas. 46 Cong. Rec. 151 (1910).

construed to their prejudice" but rather receive "broad construction in favor of the Indian".[152] Consequently, they ". . . . should be construed in such a manner as to confer upon the Indians the full measure of benefit that it was intended to secure to them."[153] These govern interpretation of allotment acts.

However, in Rowell's situation the maxims of statutory construction uniformly run against Rowell, favoring the government. Maxims such as "one may not benefit from a fraud" and terms of the grant are construed "strictly in favor of the grantor/sovereign"[154] unanimously disfavor Rowell.[155] Consequently, the context of statutory construction governing the *Rowell* case is exactly opposite of Indian allotment cases such as the case at bar.

Finally, the land involved in *Rowell* was not reservation land. Rather it was formerly a part of the Arapahoe Reservation (while Rowell laid claim as an "adopted" Kiowa). However, the Arapahoes had ceded the land to the public domain.[156] This is important for two reasons. First, the non-reservation status of the land further distinguishes the rights involved in *Rowell* from those presently before the Court. Second, the

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[152]Squire v. Capoeman, 351 U.S. 1, 7 (1955); Carpenter v. Shaw, 280 U.S. 363, 367 (1929); Choate v. Trapp, 224 U.S. 665, 675 (1912) and Worcester v. Georgia, 6 Pet. 515, 582 (1832).

[153]Starr v. Long Jim, 227 U.S. 613, 623 (1913).

[154]United States v. Grand River Dam Authority, 363 U.S. 229 (1960).

[155]Such grants are also construed most strongly against the grantee. Oregon Short Line R.Co. v. Murray City, 2 Utah 2d 427, 277 P.2d 798 (1954).

[156]46 Cong. Rec. 150 (1910).

public domain status of "Rowell's land" brings the public domain cases cited in this section directly in point.

In consequence, *United States v. Rowell*, has no proper bearing on the instant case.

CONCLUSION

In conclusion, the Respondent/allottees have a constitutionally protected interest in the minerals underlying their allotment lands. Immediate vesting, coupled with delayed possession clearly emerges as Congress' intent upon reviewing the 1926 Act's legislative history. Congress rebelled from the prospect of alloting only the "surface rights"[157] by enacting an "unequivocal and non-contingent"[158] grant of the mineral estate to the allottees. In addition, Congress omitted its "standard form" proviso allowing it to extend tribal possession.[159] The calculated omission of this often used reservation of power can only be ascribed to Congress' design to confer an immediately vesting right.

Congress' "plenary" power over Indian affairs cannot support the divestment before the Court. Such power is

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[157]The original bill disposed of the minerals by requiring a survey and alloting only "surface rights". 67 Cong. Rec. 6522 (1926).

[158]As described by Judge Choy in the decision below at 505 F.2d 268, 271 (9th Cir. 1974).

[159]The allotment acts of the Osage, Crow, Blackfeet, Fort Belknap and Standing Rock and Cheyenne River Indian Reservations provided for a transfer of minerals to the allottees "unless provided by Congress".

"plenary" because derived from a specific constitutional grant.[160] However, the grant of such a constitutional power does not free exercise of that power from other constitutional restraint, i.e., due process. Rather the rule was set forth by Justice Brandeis in *Louisville Joint State Land Bank v. Radford.*

> "The bankruptcy power like the other great substantive powers of Congress is subject to the Fifth Amendment." 295 U.S. 555, 589 (1935).

Accordingly, each constitutionally enumerated power of Congress including war making,[161] taxation,[162] exclusion of aliens,[163] bankruptcy,[164] supervision, regulation of interstate commerce,[165] and enforcement

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[160]U.S. Const. Art. I Sec. 8 cl. 3 as explained as Worcester v. Georgia, 6 Pet. 515 (1832).

[161] Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146 (1919); and Ocho v. Hernandez y Morales, 230 U.S. 139 (1912).

[162]Heiner v. Donnan, 285 U.S. 312 (1931); Blodgett v. Holden, 275 U.S. 142 (1927); Nichols v. Coolidge, 274 U.S. 531 (1926); Barclay & Co. v. Edwards, 267 U.S. 442 (1924); and Boyd v. United States, 116 U.S. 616 (1885).

[163]Wong Wing v. United States, 163 U.S. 228 (1896).

[164]Kuehner v. Irving Trust Co., 299 U.S. 445 (1936) and Louisville Joint Stock Land Bank v. Radford, 295 U.S. 55 (1934).

[165]Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604 (1949); Virginia R. Co. v. System Federation No. 40, 300 U.S. 515 (1936); United States v. Chicago, M.St.P. & P.R.Co., 282 U.S. 311 (1930); United States v. Cress, 243 U.S. 316 (1917); Carroll v. Greenwich Ins. Co., 199 U.S. 401 (1905); United States v. Lynah, 188 U.S. 445 (1902); United States v. Joint Traffic Assn., 171 U.S. 505 (1898) and Monongahela Nav. Co. v. United States, 148 U.S. 312 (1893).

of such fundamental rights as voting[166] are subject to due process limitations. Petitioner offers no *reason why* the regulation of Indian affairs should be so immuned. Indeed no such reason exists.

The mandate provided by the 1926 allotment act was perhaps best expressed by Justice Black in *Federal Power Commission v. Tuscarora Indian Nation,* "great nations, like great men, should keep their word."[167] The 1926 act promised these people possession of their minerals in 1976. This Court is left to fulfill that obligation.

Consequently, this Court should affirm the Ninth Circuit's decision below, setting aside the 1968 amendment[168] as violative of due process.

Respectfully submitted,

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[166]Hannah v. Larche, 363 U.S. 420 (1960).

[167]362 U.S. 99, 142 (1960) (dissenting opinion).

[168]Act of July 24, 1968, 82 Stat. 424.